Petition

81-245

Office-Supreme Court, U.S.
FILED
AUG 6 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. .....

MAX ABLEIDINGER and KENNETH JOHNSON,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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August, 1981

QUESTION PRESENTED

Is the decision of the Court of Appeals contrary to the expressed intent of Congress that judicial authorization for the interception and recording of electronic communications shall not be granted if normal investigative techniques have been successful?

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REPORT OF OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not yet reported. A copy of the opinion and the order denying the petition for rehearing are included in the Appendices (A and B). The opinion of the District Court is unreported, but relevant excerpts are included in Appendix E.

JURISDICTION

The jurisdiction of this Court is respectfully invoked pursuant to the authority of 28 U.S.C. § 1254(1). The opinion of the United States Court of Appeals for the Tenth Circuit was filed on April 9, 1981, and the petition for rehearing denied on May 8, 1981. On June 26, 1981, the Hon-

orable Byron White, Circuit Justice, extended the time for filing the petition for certiorari to and including August 6, 1981.

STATUTE INVOLVED

18 U.S.C. § 2518(1)(c), provides in pertinent part:

> "(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> • • •
>
> "(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous; . . ."

STATEMENT

The Petitioners petition this Court to grant a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

The sole issue raised in this petition is whether the application for electronic surveillance met the necessity requirements of 18 U.S.C. § 2518(c) that alternative means of investigation had been or would be unsuccessful. We submit that on the facts of this case, the ruling of the Tenth Circuit is overly broad and emasculates the clear and expressed intent of Congress to restrict electronic interception and surveillance to a limited number of cases where traditional methods of investigation had not or could

not be successful. The facts material to the consideration of the questions presented herein involves the admissibility as evidence of recorded electronic intercepted conversations involving petitioners and their other co-defendants.[1]

Petitioners were convicted of a conspiracy to possess and distribute marijuana and cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1) (1972) and 18 U.S.C. § 2 (1979), and with various substantive violations of the Controlled Substance Act (R p. 446) (T pp. 10, 11).[2] Petitioners proceeded to trial before the court on a stipulation of testimony. Each was adjudged guilty of the conspiracy charge, as well as guilty on several substantive charges. Petitioner Ableidinger was sentenced on March 6, 1980 to 11 years on Count 1, the conspiracy count, and five years each on the five distribution or possession counts. All sentences were to run concurrently. Petitioner Johnson was sentenced to 14 years on the conspiracy count and three years each on the distribution or possession counts. All sentences were to run concurrently.

Petitioners moved to suppress (R 39) such recordings prior to trial, but their motion was overruled (R 373, 401). When the evidence was offered at the trial to the court,

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[1] The District Court attempted to block development of some of the facts at the hearing (H 67, 68, 69, 70, 71). The effort bordered on denial of Sixth Amendment rights to effective counsel. The point was not raised on appeal because after page 70, the court ceased its interruptions, apparently appreciating the relevance of the inquiry about investigative techniques.

[2] "R" refers to the Record on appeal; "H" refers to the transcript of the hearing on the motion to suppress which was heard on November 27, 1979; "T" refers to the trial transcript of January 14, 1980.

petitioners again objected and the objections were overruled (T p. 5). The issue was raised on appeal and the issue decided against the petitioners (App. A).

The investigation which led to the convictions of the petitioners was conducted by agents of the Federal Bureau of Investigation (FBI) from June 1978 until petitioners' indictment on November 8, 1979, a period of approximately 17 months. The agent in charge was Jerry Emmons ("Emmons"). The putative targets of the FBI investigation were Eddie Riveria ("Riveria"), Robert Lopez ("Lopez"), Joseph Armstrong ("Armstrong"), and petitioners (App. C). Lopez and Riveria were business partners in an automotive repair shop "Automotive Enterprises" located at 517 Cedar Street, Perry, Oklahoma. Armstrong was an Assistant District Attorney whose area of responsibility included Noble County, the county wherein Perry, Oklahoma is located. Johnson was self-employed and lived in Perry, Oklahoma. Ableidinger, also self-employed, was a friend of Johnson, was an Idaho resident (Emmons' wiretap affidavit, pp. 1-19, App. C). The FBI learned of the activities of the petitioners apparently through confidential informants or follow-up visual surveillance.

Before it was informed by Confidential Informant #1 (C.I. #1) that Riveria and Armstrong were partners in the sale of narcotics, the FBI had obtained toll records for the telephone number used by Riveria and Lopez in their automotive business (H p. 71). These records reflected numerous intrastate and interstate calls (App. C).

Two confidential informants and two special FBI undercover agents had been introduced into the illegal enter-

prise. Although Emmons indicated C.I. #1 had refused to testify against any of the principals for fear of his safety, he subsequently stated that C.I. #2 (who was willing to testify) was an admitted long-time associate of Riveria and had furnished information to the FBI which had resulted in the arrest of two individuals and had furnished accurate information to the FBI on more than six occasions during the three months preceding the July 19, 1979 wiretap application. Indeed, the information obtained from C.I. #2 had been corroborated by an independent investigation as well as from information furnished by C.I. #1, who was not made aware that C.I. #2 was also furnishing information to the FBI, and was willing to testify. In fact, C.I. #2 was furnishing information to the FBI regarding the activities of C.I. #1 (App. C).

Fully five months prior to Emmons' affidavit in support of the July 19, 1979 wiretap application, Emmons himself had secreted a transmitter on his person and had met with Riveria and recorded the entire conversation during which Riveria advised Emmons that he could obtain stolen automobiles, farm tractors, bulldozers and other heavy equipment, including oil field equipment. Numerous other conversations of criminal activity that could have been recorded with a hidden body tape recorder were not (H pp. 73, 74). No explanation for this omission appears in the affidavit.

On March 21, 1979, the FBI learned that C.I. #2 was to meet Riveria in his private office in Perry, Oklahoma. Accordingly, prior to this meeting, a body recorder was secreted on the person of C.I. #2 by Emmons. The result was that the entire meeting between C.I. #2 and Riveria

was successfully recorded. That tape recording indicated that Riveria and Armstrong purchased $75,000.00 worth of drugs and Riveria retained in his possession $45,000.00 worth of drugs not yet sold. Most of Riveria's money was tied up in these drugs and he was in need of cash. Riveria agreed to sell the confidential informant a 1979 Mercury Cougar for $2,000.00. The Cougar automobile had previously been reported stolen by the owner, a female living in Perry, Oklahoma, as an insurance fraud. Emmons' affidavit dated July 19, 1979 (App. C).

On March 21, 1979, five months before the first wiretap application, C.I. #2 met Riveria in his private offices in Perry, Oklahoma. Prior to this meeting, a body recorder was secreted on the person of C.I. #2 by Emmons and the meeting was recorded in its entirety. In the affidavit, this meeting was summarized as follows:

> "Riveria and Robert (Lopez) purchased $75,000.00 worth of drugs and Riveria still has $45,000.00 worth in his possession not yet sold. Most of his money is tied up in these drugs and Riveria needed some cash. He agreed to sell confidential informant number 2 a 1979 Mercury Cougar for $2,000.00. This automobile was reported stolen by the owner, a female living in Perry, Oklahoma, as an insurance fraud. Riveria and Robert (Lopez) are partners in 'Automotive Enterprises', Robert having invested $6,000.00 in the business and Riveria $17,000.00. They shared the profits accordingly. They are also partners in the sale of drugs and together in the month of January, they made $45,000.00 from selling drugs.
>
> "Riveria had several head of stolen cattle penned up which he had to release when confidential inform-

ant number 2 did not appear to help him complete the theft as previously arranged.

"Riveria was planning on buying any stolen automobile parts through his body shop. We referred to these parts as 'clips'.

"Riveria is friendly with an Assistant District Attorney currently working in Norman, Oklahoma, who served in the same capacity in Perry, Oklahoma. He (Riveria) talked about paying for a big party for this individual that was held in Oklahoma City, Oklahoma. He (Riveria) also talked about making car payments for this individual when asked to do so. When confidential informant number 2 referred to this individual as Armstrong, he acknowledged this was the individual. He (Riveria) also said he was thinking of moving his operation to Norman, Oklahoma, because 'how can you be arrested when the D.A. won't prosecute?'."

On March 23, 1979, still four months before the first wiretap application, C.I. #2 told a special agent of the FBI that on March 22, 1979, he had gone to Wichita, Kansas, and obtained a 1979 Mercury Cougar which he had purchased from Riveria for $3,000.00. Part of this money was returned to Riveria to pay an old debt for which C.I. #2 was obligated to Riveria. The Cougar was obtained from an individual known as Mike Webster ("Webster"), who lived in Wichita, Kansas (App. C).

Later that same day, C.I. #2 observed that Webster and an individual known to C.I. #2 as Dave Latton, at the residence of Riveria in Perry, Oklahoma. These two individuals picked up some narcotics, which C.I. #2 thought to be marijuana.

On April 10, 1979, another FBI special agent acting in an undercover capacity, met with Riveria and Lopez at Riveria's residence in Perry, Oklahoma. The purpose of this meeting was to make an undercover buy from Lopez and Riveria of a Chevrolet pickup which had been stolen from Texas. Although the purchase of the stolen pickup was not consummated, both Riveria and Lopez attempted to get the special agent to assist them in stealing 25 head of cattle and five horses. This meeting between Lopez, Riveria and the special agent, was not recorded. Emmons' affidavit, page 13 (H p. 74).

Both C.I. #1 and C.I. #2 advised the FBI that they would contact Riveria telephonically to discuss their dealings, *yet no telephone conversation between Riveria and either of the confidential informants were ever recorded under the consent exception* (H p. 74). Emmons' wiretap affidavit, p. 11 (App. C).

On April 16, 1979, the same special agent referenced in the above paragraph, met with Riveria in Riveria's private office for the purpose of consummating an undercover buy of the stolen 1979 Chevrolet pickup. Riveria was paid $2,500.00 by the undercover agent for the pickup while they were present in Riveria's office. The special agent was instructed by Riveria to get a room in a local motel and recontact him later that night. Riveria subsequently delivered the pickup to the special agent later that night. This transaction was recorded and during the conversation, Riveria offered the agent any amount of cocaine he wanted for $2,000.00 an ounce or $70,000.00 a kilo. Emmons' affidavit, p. 13 (App. C).

On April 18, 1979, the Chief of Police of Perry, Oklahoma, furnished an FBI special agent with some information indicating that both Johnson and Ableidinger had been seen in the company of Riveria. In addition, the Chief of Police provided the FBI with Ableidinger's tag number and address in Burley, Idaho. Emmons' affidavit, p. 12 (App. C).

On April 16, 1979, an FBI special agent had met with Riveria and purchased a stolen 1979 Ford pickup for $2,-500.00.

Both C.I. #1 and C.I. #2 had advised the FBI that Riveria conducted very few of his deals over the telephone, normally insisting that the people with which he dealt with come and speak to him in person in Perry, Oklahoma. Emmons' wiretap affidavit, p. 11 (App. C).

On April 26, 1979, the same special agent telephonically contacted Riveria and indicated he wished to buy two ounces of cocaine. Riveria stated that he would attempt to locate some cocaine for him, but never did. This telephone conversation was not recorded by the special agent. Emmons' affidavit, p. 14; H p. 75 (App. C).

On May 21, 1979, C.I. #2 telephonically contacted Eddie Riveria at his place of business. During the conversation, Riveria indicated that he had cocaine for sale for $1,700.00 an ounce. After the confidential informant consulted with Emmons, he recontacted Riveria, again telephonically, and indicated he wished to purchase some cocaine later on in the afternoon of the same day. No tape recording of this telephone conversation was made (H p. 73), although the conversation was evidence of a criminal matter and the FBI knew of the conversation before it was made.

On May 21, 1979, two months before the first wiretap application, C.I. #2 telephonically contacted Riveria at his place of business in Perry, Oklahoma, in which Riveria indicated he had an ounce of cocaine for sale for $1,700.00 (App. C).

On this same date, C.I. #2 was approved for electronic monitoring and had a transmitter taped to his body. After being wired, C.I. #2 met with Riveria and petitioners in Riveria's apartment and the entire meeting was recorded. By the end of this meeting, C.I. #2 had purchased 1-1/3 oz. of cocaine from Riveria for a total of $2,275.00. Ableidinger said that he had purchased the cocaine which C.I. #2 had just purchased from Riveria in Las Vegas. Johnson and Ableidinger also discussed some highly potent marijuana in their possession which had come from Hawaii (App. C).

Later on in the afternoon of May 21, 1979, C.I. #2, Emmons and another FBI special agent, traveled in two separate vehicles to Perry, Oklahoma, where a meeting occurred between Riveria and C.I. #2. Prior to the meeting, C.I. #2 was furnished $3,500.00 and a transmitter was secreted on his body by Emmons. Thus, the meeting between Riveria and C.I. #2 was recorded in its entirety. Emmons' wiretap affidavit, pp. 10-11 (App. C).

On June 14, 1979, C.I. #1 advised the FBI that Riveria and Armstrong were partners in the sale of narcotics. The confidential informant further informed the FBI that he had seen Riveria and Armstrong together in Riveria's apartment in Perry, Oklahoma in late 1978, in posseession of approximately one pound of cocaine. Approximately two or three weeks prior to June 14, 1979, the confidential informant had met Armstrong at night near the University

of Oklahoma campus in Norman, Oklahoma. During the meeting, Armstrong attempted to persuade the confidential informant to obtain some cocaine for him from Lopez. Armstrong was to call the confidential informant after he had made the arrangement with Lopez but had not done so as of the date that the FBI received the information. No attempt was ever made to tape record these conversations. Emmons' affidavit, p. 17 (App. C) (H p. 75).

On June 15, 1979, C.I. #2 met with Riveria and Johnson at Riveria's office in Perry, Oklahoma. During this meeting, Riveria furnished the confidential informant with approximately ¾ oz. of cocaine. Johnson was present when Riveria gave the cocaine to the confidential informant.

Other than the investigative procedures presented in the cited affidavits submitted to the District Court for the the wiretap order, no other investigative procedures were employed by the FBI (H p. 71). In the July 19, 1979 application for wiretap order, the Government asserted that the affidavit contained "a full and complete statement explaining why normal investigative procedures either have been tried and have failed or reasonably appear unlikely to succeed if tried" (App. C).

Two orders were submitted to the District Court for approval to commence electronic interception, and both requests were granted.

The first order, granted July 19, 1979 (App. D), was for telephone number 405-336-5404, appearing at two locations, 1317 North 9th Street, Apt. 10, Perry, Oklahoma, and 517 Cedar Street, Perry, Oklahoma, subscribed to by Eddie Riveria, a co-defendant and telephone number 405-

336-5826, the business number of Automotive Enterprises. Emmons' Wiretap Affidavit, p. 1 (App. C). The second wiretap order entered September 12, 1979, was for telephone number 405-336-5404 only, the other having been discontinued. Emmons' wiretap affidavit dated September 12, 1979, p. 2 (App. E).

The result of the electronic surveillance was relied upon in great part by the Government at trial. These wiretaps were of material assistance in convicting the petitioners, and therefore their admission into evidence cannot be said to be harmless.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS, IN THIS CASE, CONSTRUED AN IMPORTANT PROVISION OF TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREET ACT OF 1968, TO-WIT, 18 U.S.C. 2518 (1)(c), IN A MANNER INCONSISTENT WITH THE LANGUAGE AND INTENT OF CONGRESS.

The result of (I.) above is to breach the safeguard laid down by Congress that court-authorized wiretapping orders could be obtained only if normal investigative procedures had been tried and failed or they were unlikely to succeed if tried, or to be too dangerous. It was not the intent of Congress to authorize wiretap orders where normal investigative procedures have been tried and succeeded, as they did in this case. The wiretap orders here should not have been granted because the investigative procedures which had been employed, and which were set out in detail for the affidavit to the District Court, were highly successful,

having established a prima facie case against all the principals involved in the investigation including the petitioners.

An application for a wiretap order must be made to a federal judge of competent jurisdiction because only judges of federal district courts or courts of appeal can issue federal wiretap orders. 18 U.S.C. § 2510(9). This procedure is more stringent than that required for the issuance of federal search warrants which can be issued by United States Magistrates. 18 U.S.C. § 3021. This practice was felt by the Congress to be too permissive for the interception of wire or oral communications. Thus, the purpose of § 2510 (9) was to guarantee responsible judicial participation in the determination of whether to permit surreptious interception of wire communications. This strict standard is in accord with both the letter and spirit of the constitutional demand that a neutral and detached authority be interposed between law enforcement officers and the citizen. *Berger* v. *State of New York*, 388 U.S. 41 (1967); *Katz* v. *United States*, 389 U.S. 347 (1967).

1. The "Necessity" Requirement

Title 18, § 2518(a)(c) states that each application for wire interception include:

> "A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appeared to be unlikely to succeed if tried or to be too dangerous [.]"

This statement is identified as defining the "necessity" requirement, that is, it is "necessary" for the Government to authorize electronic surveillance.

This "necessity" requirement exists to limit the use of wiretaps because of their highly intrusive nature and to "assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153, n.12 (1974). In *United States* v. *Giordano*, 416 U.S. 505 (1974), this Court recognized that wiretaps are not to be used routinely in criminal investigations, and stated:

> "The act is not as clear in some respects as it might be, but it is at once apparent that it not only limits the crimes for which intercept authority may be obtained but also imposes important preconditions to obtaining any intercept authority at all. Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and events the clear intent to make doubly sure that the statutory authority to be used with restrain and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 416 U.S., at 515.

See also *United States* v. *Kahn*, supra; *United States* v. *Abascal*, 564 F.2d 821 (9th Cir. 1977), *cert. den. sub nom.*, *Frakes* v. *United States*, 435 U.S. 942 (1978). Because the necessity requirement is required as a keystone of congressional regulation of electronics evesdropping[3] courts give close scrutiny to applications challenged for non-compli-

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[3] Electronic Surveillance, Title III, and The Requirement of Necessity, Hast. Const. L.Q. 571, 617 (1975).

ance, *United States* v. *Leon James*, 494 F.2d 1007 (D.C. D.C. 1974); *United States* v. *Pacheco*, 489 F.2d 554 (5th Cir. 1974); *United States* v. *Kalustian*, 529 F.2d 585 (9th Cir. 1975), and have rejected generalized and conclusory statements that other investigative procedures would prove unsuccessful. *United States* v. *Curreri*, 388 F.Supp. 607 (D.C. M., 1974).

2. The affidavits in the present case show the necessity requirement had not been met, thus the wiretap order should not have been granted.

Here the same application was used to support both wiretap applications (App. C and E). It is 19 pages long and describes in detail the observations of undercover agents and confidential informants over a 12-month period. It lists names of persons involved in the distribution of controlled drugs and conspiracy to distribute controlled drugs.

The undisputed facts here from the affidavit demonstrate that at no time prior to its request for a wiretap order had the Government made use of regular search warrants (H pp. 64, 65); the FBI had two undercover agents which had breached the conspiracy (App. C and E); had two informants giving direct information from the lead principals in the conspiracy (App. C and E); although one of the informants had refused to testify, the second informant had equally good information, had not refused to testify, and in fact did give evidence through a stipulation of testimony (R p. 427); the Government had made virtually no use of pen registers; only an insignificant number of witnesses, whom themselves were only mildly associated

with those under investigation were interviewed; and, finally, the Government had been successful in making two sales of cocaine which had been successfully recorded on a concealed body recorder (R p. 416).

The Emmons affidavit itself is a touchstone of the success of the investigation. Indeed, the FBI agents had been able to learn from their investigation the precise identity of a person who had been considered a likely target for a robbery attempt (though not by these petitioners). Emmons himself acknowledged that "visual surveillance has been instituted by agents of the FBI and have proved valuable in the identification of the individuals involved in the illegal enterprise" (App. C). Finally, both confidential informants had advised the FBI that Riveria, a putative defendant, conducted very few of his deals over the telephone, normally insisting that the people with whom he dealt come and speak to him in person in Perry, Oklahoma. Yet it was the Riveria telephone that the Government sought to place its wiretap on.

In summary, the Government had conducted a highly successful investigation using normal investigative techniques which has secured for it evidence to indict and convict the petitioners.

Yet, in its application for the wiretap order, Agent Emmons contended, apparently with a straight face, that normal investigative techniques had failed.

3. The intent of Congress and the plain language of the Statute bans wiretaps if the normal investigative techniques have been successful.

The statutory wording of Title III and the legislalative history make it clear that it was the expressed intent of Congress to restrict court-authorized wiretap orders to a narrow class of investigations. This intent was reflected in the statutory scheme which is repleat with examples of restraints, prohibitions, and safeguards; 2518(4)(a) requires the wiretap order to identify the persons, if known, whose communications are to be intercepted. 2518(4)(b) and (c) require the order to specify the nature and location of the communication facilities as to which or the place where, authority to intercept is granted and also particularly describe the type of communication to be intercepted and the particular offense to which it relates; 2518(5) requires the interception to last no longer than is necessary to achieve the objectives of the authorization, and the interception must be conducted in a way such as to minimize the interception of communications not subject to interception under the Act; 2518(1)(b) requires the application for the order provide information describing the offense, the facility, the type of communication and the identity of the person, if known, committing the offense; 2518(3)(a) requires a judicial finding of probable cause that the person so identified is committing the offense alleged. Finally, Congress provided that the use of wiretaps was not to be used in ordinary cases but only where normal investigative procedures had been tried or failed. In other words, as Congress said, "... electronic surveillance techniques (will) be used only under the most precise and dis-

criminating circumstances, which fully comply with the requirements of particularity." S. Rep. No. 1097, 90th Cong. Sec. Sess., p. 102.

In the legislative history describing the very section providing for the "necessity requirement", the Congressional Report stated:

> "Subparagraph (c) requires a full and complete statement as to whether or not normal investigative procedures have been tried and have failed or why these are unlikely to succeed if tried, or to be too dangerous. This requirement is patterned after traditional search warrant practice and present English procedure in the issuance of warrants to wiretap by the Home Secretary. Compare *Report of the Committee of Councillors Appointed to Inquire into the Interception of Communication*, par. 64 (1957); *Read* v. *Case*, 4 Conn. 166 (1822). The judgment would involve a consideration of all the facts and circumstances. Normal investigative procedure would include, for example, standard visual and aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants. Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely. See *Giancana* v. *United States*, 352 F.2d 921 (7th) certiorari denied, 86 S.Ct. 437, 382 U.S. 959 (1965); *New York* v. *Saperstein*, provisions envisions is that the showing be tested in a practical and commonsense fashion. Compare *United States* v. *Ventresca*, 85 S.Ct. 741, 380 U.S. 102 (1965)." At 2190.

This Court has explicitly recognized the Congressional concern and the requirement that normal investigative

techniques either be tried and unsuccessful or too dangerous to attempt to try. This Court described the "necessity requirement" as being ". . . designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153, n.12 (1974). To reach this conclusion, the Court relied upon the legislative history cited immediately above.

4. The decision of the Court of Appeals ignores the intent of Congress and the statutory safeguards.

If the facts in this case support a conclusion that normal investigative techniques have failed, then the eventuality most feared by Congress when it passed the wiretap statute has come to pass with the opinion of the Court of Appeals in this case; that is, surreptitious wiretaps may now be used by the Government to go on vast fishing expeditions in an attempt to net, apprehend and prosecute as many persons as possible with little or no justification, and then use the additional evidence against principals for which it already had, through normal investigative techniques, sufficient evidence to indict and convict for the precise crimes ultimately charged.

The Court of Appeals decision was too broad and emasculates the necessity requirement so that electronic interception now is inhibited only by the self-discipline of the Government or the lack of technical equipment.

5. The standard judicial inquiry to determine whether the "Necessity" Requirement has been met.

The petitioners suggest that in view of the statute's legislative history and decisions of the United States Supreme Court and the Circuit Courts of Appeal, a wiretap application does not meet the necessity requirement when one or more of five circumstances are present. First, a wiretap application must fail when the Government has already established a prima facie case against the person for the crime under investigation at the time the wiretap application is submitted. Second, a wiretap application must fail when the normal investigative procedures which the Government has employed prior to submitting the wiretap application have been successful and no indication is apparent that they not continue to be successful. Third, a wiretap application must fail when normal investigative procedures, including standard visual surveillance techniques, general questioning or interrogation under an immunity grant, use of regular search warrants, and infiltration of conspiratorial groups by undercover agents and/or informants, have not been employed and no good reason has been given for the failure to use them. Fourth, a wiretap application must fail when both the application and the affidavit in support of the application for a wiretap order contain mere bald assertions that normal investigative procedures have been tried and failed or are not likely to succeed if tried or are too dangerous. Finally, petitioners argue that a federal judge should not be permitted to use subsequent sworn testimony of a government official to validate retroactively a wiretap application whose support-

ing affidavit did not set forth in detail why normal investigative procedures were not employed or were said to be unlikely to succeed if tried or were too dangerous.

The application here fails to meet any of these commonsense and practical guidelines. The Government had sufficient evidence to indict and convict petitioners; the normal investigative techniques had been successful; other conventional investigative techniques had not been employed and there was no showing they would be unsuccessful or dangerous; the allegations that the techniques had not or that others would not be successful, was made only in a conclusory form, and finally the trial judge used subsequent sworn testimony of a government official to validate retroactively a wiretap application.

Finally, it is clear that the wiretap in question here was not to be used to develop sufficient evidence to indict or convict the targets of the investigation, but to try to learn the identity of others who might be arrested. However, that elusive goal exists in any criminal investigation. Law enforcement personnel always want to apprehend, indict and convict all members of a conspiracy if possible, and there is simply no limit to that ambition once activated. For any FBI agent or assistant United States Attorney can always claim there are other unknown coconspirators and he needs only a wiretap order to learn their identity. Perhaps Congress could have, within the Fourth Amendment, even granted such power, but it didn't, and its intent controls.

Congress did not intend wiretaps to be used in every case, nor did it leave the decision to law enforcement

whether the facts or scope of the investigation justified the wiretap on the hope that others, yet unknown, might turn up.

Nor is it enough to say that a commonsense or practical approach is sufficient. That guideline is to measure whether normal investigative techniques have succeeded or would be too dangerous to use. The Court of Appeals paid too much attention to the "commonsense" or "practical approach" and too little to the interlocking safeguards and inhibitions that criss-cross the whole statutory scheme. If a judge can approve this wiretap on these facts and claims, then a wiretap can be obtained in any case. Congress granted a narrow legal license for law enforcement to engage in this "dirty business", *Olmstead* v. *United States*, 277 U.S. 438, 470 (dissenting opinion) (1927), not a poet's license to manufacture "other unknown" persons as a justification for court-sanctioned wiretaps. Allowed to stand, the opinion below lays the groundwork for wiretaps to become the rule, not the exception.

II. THE DECISION OF THE COURT OF APPEALS BELOW IS IN CONFLICT WITH *UNITED STATES* v. *SANDOVAL*, 550 F.2d 427 (9th Cir. 1976).

Although both circuits upheld the admissibility of the wiretap evidence against a claim that the "necessity requirement" had not been met, the reasoning of the Ninth Circuit of why the requirement had been met more nearly comports with the intent of Congress and this Court's holding in *Kahn* than did the opinion of the court below which appeared to be more interested in upholding the convictions of two convicted cocaine dealers with insufficient attention to the broad impact of its decision. In *Sandoval* the sole issue before the Ninth Circuit was whether the district court, in analyzing the underlying affidavit for the wiretap order, was correct in its determination that the affidavit did not furnish a basis to show compliance with 18 U.S.C. § 2518(c).

The *Sandoval* court felt that the district court had taken a too narrow and restrictive a perspective of the scope and objectives of the *government's investigation* of the criminal organization of which Sandoval was the head. The court *did not hold* that Section 2518(3)(c) should be given a broad interpretation, rather the court *looked at the affidavit* which was filed in support of the wiretap application. Referring to the affidavit, the court determined that the objectives of the investigation were broader than "the mere apprehension of Sandoval and his wife." At 430. In order to determine whether the scope of the investigation was legitimately broader than the apprehension of Lopez, Riveria, Ableidinger and Johnson, we can contrast the two decisions to show the conflict. The *Sandoval* court said:

"The affidavit discloses that the law enforcement officials were *just as concerned* in apprehending all of Sandoval's numerous 'satellites' that made up his distribution scheme. Additionally, it is apparent that the officers involved wanted to find the storage locations and recover the illegal heroin, the actual possession of which Julian Sandoval had insulated himself from [sic] elaborate machinations.

* * *

"[Our] review discloses that the affidavit is sufficient to show that these 'satellites' probably would not have been uncovered and sufficient evidence would not have been adduced through the use of normal investigative procedures." At 430 (emphasis added).

Thus, the *Sandoval* court was persuaded, by reference to the wiretap application's supporting affidavit, that the scope of the investigation extended beyond the known principals; *concluding also that normal investigative procedurees would not have uncovered those persons who were felt to fall within the broader scope of the investigation.* 550 F.2d at 430 (Emphasis added).

Of critical importance to resolving the "necessity" issue are the *factual statements* contained in an affidavit filed in support of a wiretap application. The *Sandoval* court presented those portions of the affidavit it felt most relevant in note 1 of its decision. The factual circumstances outlined in the *Sandoval* affidavit are set forth in full below.

"Your affiant and the members of the Metropolitan Area Narcotics Squad have concluded that *all means have been exhausted short of a wiretap* in trying to compile enough evidence to effect an arrest on JULIAN SANDOVAL and his wife AMELO TREGO *as well as*

the other known or unknown members of his organization on the illegal possession, sales and distribution of heroin for the following reasons:

"(1) That when JULIAN SANDOVAL orders large amounts of heroin from Mexico, *he uses his relatives or distributors to take possession of the heroin and to cut it.*

"(2) That such heroin is then distributed by *these certain individuals* to different residents for storage.

"(3) That JULIAN SANDOVAL has insulated himself by taking heroin orders *by telephone* at his residence, 5261 South Champion, Strav., Tucson, Arizona.

"(4) That JULIAN SANDOVAL does not keep narcotics in his residence but *uses the telephone* to call his heroin distributors to make deliveries of heroin to his customers.

"(5) That JULIAN SANDOVAL has spurned all efforts by informers to make deliveries of heroin to his customers.

"(6) That according to informants 1, 2, 3, 4, and 5, JULIAN SANDOVAL has taken steps to inform all of his heroin customers and distributors that he will not permit any of them to introduce or bring to his residence unknown subjects. This in turn *prevents the introduction of undercover narcotics agents into SANDOVAL's operation.*

"(7) *The surveillance by the Metropolitan Area Narcotics Squad has been unsuccessful because JULIAN SANDOVAL insulates himself against being caught in possession of narcotics himself.*

"(8) Further that confidential informant 5 related to your affiant that he was reluctant to give your affiant further information on JULIAN SANDOVAL because if JULIAN SANDOVAL found out confidential

informant 5 was afraid that JULIAN SANDOVAL would put out a contract on his (confidential informant 5) life.

"(9) *Further that confidential informants 1, 2, 3, 4 and 5 are each unwilling to testify for the state against JULIAN SANDOVAL and his organization for fear of personal safety.*

"(10) That other investigative procedures have been tried and failed and your affiant believes that any other investigative procedures other than those already employed would not likely succeed and would be too dangerous.

"(11) That one and a half kilos of heroin are presently being stored in the Tucson Metro Area and the only means of finding the storage, location and recovering the illegal heroin is through a wiretap placed on the telephone number 294-6438." 550 F.2d at 428 (Emphasis added).

From the above presentation of facts contained in the affidavit in support of the Sandoval application, it is clear that the Ninth Circuit felt that it was of paramount and critical importance that:

1. The affidavit stated *specifically* that a *primary objective* of the investigation was to apprehend not only the principals but other individuals "known and unknown" *and that normal investigative techniques would not be successful* in apprehending the other known and unknown individuals.

2. The business was conducted *solely over the telephone* from the residence of the principal putative defendant.

3. The Government was categorically prohibited from *introducing undercover agents into the conspiracy.*

4. *Each and every one of the Government's confidential informants refused to testify!*

5. The principal putative defendants had insulated themselves by relatively elaborate procedures, and the only way to pierce the insulation was by wiretap because *the phone was their primary tool.*

6. The Government did not know where, nor could it even speculate as to where, the illegal contraband was being stored.

Each and every one of the critical factors outlined above are not present in this case. In fact, the circumstances of this case are exactly opposite from the facts presented in the Sandoval decision. The factual differences are pointed out with specific particularity below:

1. The affidavit submitted in support of the wiretap orders at issue here contained absolutely no language whatsoever[4] indicating that the scope of the investigation extended beyond Riveria, Lopez, Armstrong and the petitioners, and that normal investigative techniques could not be expected to reveal the identity of "others unknown."

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[4] Although the affidavit does mention "others unknown", this phrase appears only in passing and it is *never alleged* that normal investigative techniques will likely be unsuccessful in apprehending or identifying the "others unknown". Of course, the absence of such allegation is not surprising in view of the excellent results obtained against the principals themselves through the use of normal investigative techniques.

2. The Government had been able to introduce as many as *four undercover agents into the conspiracy here.* Each of the undercover agents could give testimony which could prove a felony. These felonies included (a) conspiracy to distribute a controlled substance, to-wit, cocaine and marijuana; (b) interstate transportation and sale of stolen vehicles; (c) conspiracy to sell stolen cattle; and (d) distribution of a controlled substance, cocaine.

3. One of the two confidential informants who was a participant in the ongoing conspiracy in this matter, had in fact been wired for sound, thus creating evidence which would corroborate his testimony. Moreover, this confidential informant *was willing to testify on behalf of the Government.* His testimony would establish a prima facie case for the crime for which the petitioners were ultimately indicted and convicted.

4. Rather, than using the telephone solely as a manner to conduct his business, the confidential informants here had informed the Government specifically that the *telephone was never used to conduct business.*

Based on the facts presented in the *Sandoval* affidavit, the Ninth Circuit Court of Appeals concluded that although the Government had established a prima facie case against the principal conspirators, the district court nonetheless erred when it concluded that the wiretap affidavit did not comply with the requirements of Section 2518(3)(c) on the ground that the confidential informants which could establish the prima facie case were unwilling to testify at trial, and that the full scope of the investigation, which

had been disclosed on the face of the affidavit, could not be successfully obtained with a wiretap order. Thus, in direct contrast to the *Sandoval* affidavit, the affidavit now at issue did not disclose on its face that the objective of the investigation was to "apprehend as many conspirators as possible, both known or unknown", as the Government asserted in its brief.

III. THERE IS A CONFLICT AMONG THE DISTRICT AND CIRCUIT COURTS AS TO THE STANDARD TO BE USED TO DETERMINE WHETHER THE NECESSITY REQUIREMENT HAS BEEN MET.

Title III appears specifically to permit electronic surveillance only in "those situations clearly calling for employment of this extraordinary device." *United States* v. *Giordano*, 416 U.S. 505, 527 (1973). However, as this Court recognized in *Giordano*, "the Act is not as clear in some respects as it might be, but it is at once apparent that it not only limits the crimes for which intercept authority may be obtained, but also imposes important preconditions to obtaining any intercept authority at all. . . ." 416 U.S., at 515.

The statute, as the Court noted, is not completely clear, and thus lends itself to more than one construction. Some district and circuit courts have given a broad construction to the Act, construing it somewhat less than strictly and have not held the Government to investigatory necessity, but rather have implemented a standard which is, in effect, one of investigatory utility. See *United States* v. *Smith*, 519 F.2d 516, at 518 (9th Cir. 1975); *United States* v. *Staino*, 358 F.Supp. 852, 856-7 (D.C. Pa. 1973); *United States* v.

Whittaker, 343 F.Supp. 358 at 362 (D.C. Pa. 1972), and *United States* v. *Robertson*, 504 F.2d 289, 293 (5th Cir. 1974).

Other courts have not permitted secret electronic surveillance where there is no substantial necessity and conventional alternatives could suffice, and a detailed sufficient showing is made of these facts to the issuing judge. *United States* v. *Escandar*, 319 F.Supp. 295, 304 (D.C. Fla. 1970), *rev'd sub nom, United States* v. *Ceraso*, 467 F.2d 647 (3rd Cir. 1972). Other courts demanding a much stricter compliance with the requirement of exhaustion are, *inter alia*, *United States* v. *Armocida*, 515 F.2d 29 (3rd Cir. 1979); *In re Dunn*, 507 F.2d 195 (1st Cir. 1974); *United States* v. *Robertson*, 504 F.2d 289 (5th Cir. 1974); *United States* v. *Falcone*, 364 F.Supp. 877 (D.C. N.J. 1973); *United States* v. *Baynes*, 400 F.Supp. 284 (D.C. Pa. 1975); *United States* v. *Curreri*, 388 F.Supp. 607, 622 (D.C. Md. 1974).

The district and circut courts in *Smith*, *Staino*, *Whittaker*, *Robertson*, and *Escandar*, supra, have interpreted the necessity requirement as being met under much less stringent circumstances than the district courts and circuit courts in *Armocida*, *Robertson*, *Falcone*, *Baynes*, and *Curreri*, supra.

This conflict over the appropriate standard to determine whether the necessity requirement has been met has been the subject of comment by the National Commission for the Review of Federal and State laws relating to wiretapping and electronic surveillance. The Commission's 1976 report specifically noted this conflict (at page 18 and page 66), and argued that the imposition of the less stringent standard was contrary to congressional intent and the con-

stitutional requirements (National Wiretapping Commission Report, 1976, pp. 5, 142).

A review of the cases cited above will show that the conflict is genuine and real, one likely to continue. as the use of court-authorized interception of electronic communications increases. We respectfully submit that this Court should accept certiorari to resolve this conflict, that the standard set forth, supra, at pages 20-21 should be adopted as the yardstick by which the court may determine whether the necessity requirement has been met.

CONCLUSION

Petition for Writ of Certiorari should be granted and the judgment of conviction should be reversed and the cause remanded for a new trial with instructions to the trial court to suppress as evidence the recorded interception of electronic communications.

Respectfully submited,

STEPHEN JONES, of
JONES & GUNGOLL
P. O. Box 1549
Enid, Oklahoma 73701
(405) 242-5500

Counsel of Record for Petitioners Ableidinger and Johnson

DATED this _____ day of August, 1981.

CERTIFICATE OF SERVICE

This is to certify that I, Stephen Jones, Attorney for the Petitioners, made service of the foregoing Petition for Writ of Certiorari by mailing three (3) copies of same to the Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530, this ..... day of August, 1981, with postage fully prepaid.

.....

Stephen Jones

APPENDIX A

[Decision of United States Court of Appeals
For the Tenth Circuit, April 9, 1981]

[Filed April 9, 1981]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 80-1283, 80-1295, and 80-1321

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENNETH JOHNSON, MAX ABILEDINGER, and PATRICK JOSEPH ARMSTRONG, Defendants-Appellants.	))))))))	Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. CR 79-176-E)

Charles Lee Waters, Assistant United States Attorney (Larry D. Patton, United States Attorney, with him on the brief), Oklahoma City, Okla, for Plaintiff-Appellee.

Stephen Jones (James Craig Dodd, with him on the brief), Enid, Oklahoma, for Max Abiledinger and Kenneth Johnson, Defendants-Appellants.

Leonard D. Munker, Federal Public Defender, District of Kansas, Wichita, Kansas, for Patrick Joseph Armstrong, Defendant-Appellant.

Before McWILLIAMS, DOYLE, and LOGAN, Circuit Judges.

McWILLIAMS, Circuit Judge.

Max Abiledinger, Kenneth Johnson, and P. Joseph Armstrong, along with five other persons, were charged in a 26-count indictment with conspiracy to possess and distribute marijuana and cocaine, in violation of 21 U.S.C. §§ 846, 841(a) (1) (1972) and 18 U.S.C. § 2 (1979), and with various substantive violations of the Controlled Substances Act. Abiledinger and Johnson proceeded to trial before the court on a stipulation of testimony. Each was adjudged guilty on the conspiracy charge, as well as guilty on several substantive charges. Both appeal their respective convictions.

Armstrong waived a jury trial, and, on trial to the court, was found guilty on the conspiracy count, as well as on several substantive charges. He appeals his conviction.

These three appeals were not formally consolidated on appeal. They were, however, companioned for the purposes of oral argument and will be disposed of in one opinion.

Nos. 80-1283 and 80-1295

These two appeals relate to defendants Abiledinger and Johnson. Both raise the same two arguments: (1) the affidavit in support of the application for electronic surveillance was legally insufficient and, therefore, the evidence resulting from the electronic surveillance should have been suppressed; and (2) the affidavit in support of the application for a warrant to search the home of Johnson was legally insufficient and, accordingly, the items seized in the subsequent search of Johnson's home should not have been admitted into evidence at trial.

At the outset we note that affidavits in support of an application for a wiretap order, as well as affidavits in support of a search warrant, are to be read in a practical and commonsense manner rather than hypertechnically. United

States v. Santarpio, 560 F.2d 448, 453 (1st Cir.), *cert. denied*, 434 U.S. 984 (1977); *see also* United States v. Ventresca, 380 U.S. 102, 108-109 (1965), and United States v. Rios, 611 F.2d 1335 (10th Cir. 1979), *later appeal*, 637 F.2d 728 (10th Cir. 1980).

In regard to the defendants' initial contention, the procedure for the interception of wire or oral communications is set forth in 18 U.S.C. § 2518 (1979). 18 U.S.C. § 2518(1)(c) provides that an application for an order authorizing the interception of a wire communication shall include the following:

> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

It is the appellants' position that the affidavit of FBI Special Agent Jerry Emmons does not meet the "necessity" requirement of 18 U.S.C. § 2518(1)(c), *i.e*, the affidavit did not demonstrate a need to use electronic surveillance, instead of more traditional investigative procedures. We do not agree with this argument. The provisions of 18 U.S.C. § 2518(1)(c) are not designed to force the Government to exhaust all other conceivable investigative procedures before resorting to wiretapping. Rather, that section of the statute serves to insure that wiretapping is not used in situations where traditional investigative techniques would suffice to expose the crime. United States v. Santarpio, 560 F.2d at 452; United States v. Clements, 588 F.2d 1030, 1036 (5th Cir.), *cert. denied*, 440 U.S. 982 and *cert. denied*, 441 U.S. 936 (1979).

In the instant case, the orders under attack authorized the wiretap of the home of one Eddie Riveria, and his place of business. Eddie Riveria was one of the eight individuals subsequently indicted and was a principal actor in a drug ring of considerable proportions. We have studied the affi-

davits of FBI Agent Emmons and believe that each meets the requirements of 18 U.S.C. § 2518(1) (C). Emmons outlined the investigative procedures that had been used and, in our view, demonstrated the need for wiretapping. By the time the application for wiretap authorization was made, Riveira's involvement was fairly well established. The FBI was properly concerned, however, with identifying all of the members of the conspiracy, as well as the precise nature and scope of thee illegal activity. Both the apprehension of so-called "satllites" involved in the distribution scheme and the determination of the dimentions of an extensive drug conspiracy have ben held to justify the use of electronic surveillance. United States v. Sandoval, 550 F.2d 427, 430 (9th Cir. 1976), *cert. denied*, 434 U.S. 879 (1977); United States v. Abascal, 564 F.2d 821, 826 (9th Cir. 1977), *cert. denied*, 435 U.S. 942 and *cert. denied*, 435 U.S. 953 (1978). In light of such decisions, the affidavit of Agent Emmons comports with 18 U.S.C. § 2518(1)(c).

The appellants also contend that Agent Emmon's affidavit in support of the warrant to search Johnson's home was legally insufficient. The appellants claim that the affidavit in the instant case did not inform the issuing magistrate of any underlying circumstances from which it could be concluded that the narcotics, or evidence related thereto, could be found in Johnson's residence as required by Aguilar v. Texas, 378 U.S. 108, 114 (1964). It is not necessary, however, that the affidavit indicate that the evidence sought will undoubtedly be found in the place to be searched. Rather, it is only necessary that the facts and circumstances described in the affidavit warrant a man of reasonable caution to believe that such evidence is located at the premises or location to be searched. United States v. Rahn, 511 F.2d 290, 293 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975); Edmondson v. United States, 402 F.2d 809, 812 (10th Cir. 1968). In our view, the affidavit established probable

cause and the items seized[1] in the search of Johnson's residence were properly admitted into evidence.

No. 80-1321

The primary ground urged by Armstrong for reversal is that the evidence in support of his conviction for conspiring to distribute cocaine is legally insufficient. Armstrong, and the others, were charged with conspiracy to distribute both marijuana and cocaine, Schedule I and II controlled substances, respectively, in violation of 21 U.S.C. § 846 (1976). The trial court found Armstrong guilty of the conspiracy charge. On appeal, counsel concedes that the evidence is amply sufficient to support a conviction for conspiring to distribute marijuana, but argues that it is legally insufficient to show a conspiracy to distribute cocaine. We think counsel reads the record too narrowly.

This conspiracy had its inception when Armstrong, who was then serving as an assistant district attorney in Oklahoma, aided Eddie Riveira and his business associates, Robert Lopez, in the theft of approximately 2,200 pounds of confiscated marijuana by informing them of its location and allowing them to steal it. After the marijuana was cleaned and sold, Armstrong shared in the proceeds of the sales, such as they were. The foregoing, however, was not the only basis for the indictment. After this initial transaction, additional marijuana was acquired and distributed. Later, the operation was expanded to include the ac-

[1]Among other things, the search of Johnson's residence led to the seizure of the following: (1) one RCBS reloading scale; (2) two address books; (3) one box of hypodermic needles; (3) two smoke grenades; (4) a revolver and holster; (5) $4550 in fifty dollar and twenty dollar bills; (6) $20,000 in one hundred dollar and fifty dollar bills; (7) 15 plastic envelopes containing a white substance which was later determined to be cocaine; (8) one bottle of lactose monohydrate powder; and (9) a brown leather purse containing 24 rings and a plastic bag containing a greenish-brown substance.

quisition and sale of cocaine. Armstrong at no time withdrew from the conspiracy. On the contrary, the testimony indicated that Armstrong knew of Abiledinger and Johnson's activities and discussed some of the cocaine transactions with Eddie Riveira. Armstrong had in fact used cocaine with Riveira and obtained cocaine for his personal use from Riveira. He also used the information which he acquired by virtue of his office to warn his co-defendants that they were under suspicion, and, indeed, advised them of the status of proceedings before a Grand Jury, which was inquiring into the entire matter. Suffice it to say, the record supports the trial court's finding that Armstrong conspired to distribute cocaine, as well as marijuana.[2] Accordingly, the sentence imposed by the trial court on the conspiracy to distribute cocaine charge, *i.e.*, nine years imprisonment, was permissible under the applicable statute[3] and will not be disturbed on appeal. *See* United States v. Bridwell, 583 F.2d 1135, 1142 (10th Cir. 1978).

Armstrong's other contentions have been considered and do not require comment.

All judgments affirmed.

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[2]We note that the conviction of a co-conspirator may be sustained upon a sufficient showing of the essential nature of the plan and the individual's connection with it. It is not necessary that each member of the conspiracy know all of the details or be acquainted with all of the parties to the illegal scheme, as long as he is aware of its general scope. Blumenthal v. United States, 332 U.S. 539, 557 (1947); United States v. Parnell, 581 F.2d 1374, 1382 (10th Cir. 1978), *cert. denied*, 439 U.S. 1076 (1979).

[3]The applicable statute is 21 U.S.C. § 846 (1972) which provides that the maximum sentence which may be imposed upon a conviction of conspiracy may not exceed the maximum punishment prescribed for the commission of the offense which was the object of the conspiracy. In this case, that maximum was 15 years as prescribed by 21 U.S.C. § 841 (b)(1)(A) (1972).

APPENDIX B

[Order of the United States Court of Appeals for the Tenth Circuit Denying Petition for Rehearing]

MARCH TERM — April 8, 1981

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 80-1283
MAX ABILEDINGER Defendant-Appellant.	)	

The matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panell to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS, Clerk

By: (s) *Robert L. Hoecker*
Chief Deputy Clerk

[APPENDIX]

MARCH TERM — April 8, 1981

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 80-1295
KENNETH JOHNSON, Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS, Clerk

By: (s) *Robert L. Hoecker*
Chief Deputy Clerk

APPENDIX C

[First Application and Affidavit for Wiretap Order]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed _____, 1979]

IN THE MATTER OF THE APPLICATION)
OF THE UNITED STATES FOR AN ORDER) No. _____
AUTHORIZING THE INTERCEPTION OF)
WIRE COMMUNICATIONS)

APPLICATION

Charles Lee Waters, Assistant United States Attorney for the Western District of Oklahoma, being duly sworn, states:

1. He is an "investigative or law enforcement officer — of the United States" within the meaning of Section 2510 (7) of Title 18, United States Code, that is — an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable Griffin Bell, has authorized this Application for an Order authorizing the interception of wire communications. Attached to this Application as Exhibit A are the letter of notification of approval from the Criminal Division and a copy of the Attorney General's memorandum of authorization.

3. This Application seeks authorization to intercept wire communications of Eddie Riveira, Jr., hereinafter referred to as Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson, Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong, and others as yet unknown concerning offenses involving the sale and

distribution of controlled substances in violation of Section 841 of Title 21, United States Code, and conspiracy to commit such offenses in violation of Section 846 of Title 21, United States Code, and offenses involving Interstate Travel in Aid of Racketeering (narcotics) in violation of Section 1952 of Title 18, United States Code; Interstate Transportation of Stolen Property in violation of Section 2314 of Title 18, United States Code; and Conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code; offenses involving Racketeer Influenced and corrupt Organizations in violation of Title 18, United States Code, Section 1963, more particularly defined in Sections 1962 (c) and 1962 (d), with acts of racketeering as defined in Section 1961 of Title 18, United States Code as follows: The above described violations of Sections 1952 and 2314 of Title 18, United States Code and violations of Section 841 of Title 21, United States Code, and violations of Oklahoma State Statutes relating to robbery and the sale of drugs and narcotics, both of which are punishable by imprisonment for more than one year, which have been committed and are being committed by Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong; and others as yet unknown.

4. He has discussed all the circumstances of the above offenses with Special Agent Jerry L. Emmons of the Oklahoma City Office of the Federal Bureau of Investigation who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent Jerry L. Emmons (attached to this Application as Exhibit B and incorporated by reference herein) which alleges the facts therein in order to show that:

(a) There is probable cause to believe that Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong, and others as yet unknown, have committed and are committing offenses involving violations

of Sections 1951, 1952, 2314, 371, and 1963 of Title 18, and violations of Sections 841 and 846 of Title 21, United States Code.

(b) There is probable cause to believe that particular wire communications of Eddie Riveira also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong, and others as yet unknown concerning these offenses will be obtained through the interception for which authorization is herewith applied. In particular, these wire communications will include discussions about the dissemination of confidential information belonging to law enforcement agencies, the sale and distribution of cocaine, marijuana and other controlled substances, and Interstate Transportation in Aid of a Narcotics Business, participation in a Racketeer Influenced and Corrupt Organization; the identity of the participants; the precise nature and scope of the illegal activity; and the relationships of the organization with other racketeering groups. In addition, the communications are expected to constitute admissible evidence of the commission of the offenses in violation of Section 2312 of Title 18, United States Code (Transportation of Stolen Vehicles), Section 2316 of Title 18, United States Code (Transportation of Cattle) and Section 2317 of Title 18 United States Code (Sale or Receipt of Cattle).

(c) The attached affidavit contains a full and complete statement explaining why normal investigative procedures either have been tried and have failed or reasonably appear unlikely to succeed if tried.

(d) There is probable cause to believe that to and from telephone number 405/336-5404, appearing in two locations, 1317 North Ninth Street, Apartment 10, Perry, Oklahoma, and 517 Cedar Street, Perry, Oklahoma, and subscribed to in the name of Eddie Riveira, and to and from telephone number 405/336-5826, the business number of Automotive Enterprises, 517 Cedar Street, Perry, Oklahoma, and subscribed to by Eddie Riveira and Robert Lo-

pez, partners, have been used and are being used by Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong also known as Joe Armstrong and others as yet unknown in connection with the commission of the above-described offenses.

5. No previous Application to any Judge for authorization to intercept or for approval of interceptions of wire or oral communications involving any of the same persons, facilities, or places specified in this application are known to the individual authorizing and making this applilcation.

WHEREFORE, your affiant believes that probable cause exists to believe that Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson, Max Abiledinger; P. Joseph Armstrong also known as Joe Armstrong and others as yet unknown, are engaged in the commission of offenses involving the sale and distribution of controlled substances in violation of Section 841 of Title 21, United States Code, and conspiracy to commit such offenses in violation of Section 846 of Title 21, United States Code and offenses involving Interstate Travel in Aid of Racketeering (narcotics) in violation of Section 1952 of Title 18, United States Code; offenses involving the Interstate Transportation of Stolen Property in violation of Section 2314 of Title 18, United States Code; and Conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code; offenses involving Racketeer Influenced and Corrupt Organizations in violation of Title 18, United States Code, Section 1963, more particularly defined in Sections 1962 (c) and 1962 (d), with acts of racketeering as defined in Section 1961 of Title 18, United States Code as follows: The above described violations of Sections 1952 and 2314 of Title 18, United States Code and violations of Section 841 of Title 21, United States Code and violations of Oklahoma State Statutes relating to robbery and the sale of drugs and narcotics, both of which are punishable by imprison-

ment for more than one year, that Eddie Riveira also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong and others as yet unknown, are using the premises at 1317 North Ninth Street, Apartment 10, Perry, Oklahoma, carrying telephone number 405/336-5404, which is subscribed to by Eddie Riveira, also known as Eddie Rivera, the premises located at 517 Cedar Street, Perry, Oklahoma, carrying telephone numbers 405/336-5404, mentioned above, and 405/336-5826, which is the business number of Automotive Enterprises at 517 Cedar Street, Perry, Oklahoma, and subscribed to by Eddie Riveira and Robert Lopez, partners in connection with the commission of the above-described offenses; that communications of Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong and others as yet unknown, concerning these offenses will be intercepted to and from the above-described telephones; and that normal investigative procedures appear unlikely to succeed.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent Jerry L. Emmons, attached hereto, affiant requests this court to issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation to intercept wire communications to and from the above-described telephones until communications are intercepted which reveal the manner in which Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong and others as yet unknown, participate in the commission of offenses involving the sale and distribution of controlled substances in violation of Section 841 of Title 21, United States Code, and conspiracy to commit such offenses in violation of Section 846 of Title 21, United States Code, and offenses involving Interstate Travel in Aid of Racke-

teering (narcotics) in violation of Section 1952 of Title 18, United States Code; Interstate Transportation of Stolen Property in violation of Section 2314 of Title 18, United States Code; and Conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code; offenses involving Racketeer Influenced and Corrupt Organizations in violation of Title 18, United States Code, Section 1963, more particularly defined in Sections 1962 (c) and 1962 (d), with acts of racketeering as defined in Section 1961 of Title 18, United States Code as follows: The above described violations of Section 1952 and 2314 of Title 18, United States Code and violations of Section 841 of Title 21, United States Code and violations of Oklahoma State Statutes relating to robbery and the sale of drugs and narcotics, both of which are punishable by imprisonment for more than one year, and which reveal the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of thirty (30) days from the date of that order, whichever is earlier.

It is further requested that this court issue an order pursuant to Section 2518(4)(e) of Title 18, United States Code, directing that the Southwestern Bell Telephone Company, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith all information facilities, and technical assistance necessary to accomplish the interception unobstrusively and with a minimum of interference with the services that such a carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the Southwestern Bell Telephone Company to be compensated for by the applicant at the prevailing rates.

(s) *Charles Lee Waters,*
Assistant U.S. Attorney

LARRY D. PATTON
United States Attorney

Subscribed and sworn to before me this *19th* day of *July*, 1979.

(s) *Ralph G. Thompson*
U. S. District Judge

AFFIDAVIT

Jerry Emmons, Special Agent, Oklahoma City Office, Federal Bureau of Investigation, United States Department of Justice, being duly sworn state:

1. I am a Special Agent of the Federal Bureau of Investigation and have been so employed since August 8, 1967. I am an "Investigator, a law enforcement officer of the United States," within the meaning of Section 2510 (7) of Title 18, United States Code, that is, an officer of the United States who is empowered by law to conduct investigations and to make arrests for offenses enumerated in Section 2516 of Title 18, United States Code.

2. This affidavit is submitted in support of an application for an order authorizing the interception of wire communications for a 30 day period under Section 2518 of Title 18, United States Code, of Eddie Riveira, Jr., hereinafter referred to as Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; and P. Joseph Armstrong, and others yet unknown to and from telephone number 405/336-5404, appearing in two locations, 1317 North Ninth Street, Apartment 10, Perry, Oklahoma, and 517 Cedar Street, Perry, Oklahoma, and subscribed to in the name of Eddie Riveira, and to and from telephone number 405/336-5826, the business number of Automotive Enterprises, 517 Cedar Street, Perry, Oklahoma, and subscribed to by Eddie Riveira and Robert Lopez, partners, concerning offenses enumerated in Section 2516 of Title 18, United States Code, that is:

(a) Offenses involving the sale and distribution of controlled substances, in violation of Section 841 of Title

21, United States Code, and conspiracy to commit such offenses in violation of Section 846 of Title 21, United States Code; offenses involving Interstate Travel in Aid of Racketeering (narcotics) in violation of Section 1952 of Title 18, United States Code, offenses involving the Interstate Transportation of Stolen Property in violation of Section 2314 of Title 18, United States Code; and conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code; offenses involving Racketeer Influenced and Corrupt Organizations in violation of Title 18, United States Code, Section 1963, more particularly defined in Sections 1962 (c) and 1962 (d), with acts of racketeering as defined in Section 1961 of Title 18, United States Code as follows:

The above described violations of Sections 1952 and 2314 of Title 18, United States Code and violations of Section 841 of Title 21, United States Code and violations of Oklahoma State statutes relating to robbery (Section 798 of Title 21, Oklahoma Statutes Annotated) and the sale of drugs and narcotics (Section 2-401 of Title 63, Oklahoma Statutes Annotated), both of which are punishable by imprisonment for more than one year, which offenses have been committed are being committed and will be committed by Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; and P. Joseph Armstrong, also known as Joe Armstrong, and others as yet unknown.

4. No previous applications are known to have been made to any judge for authorization to intercept or for approval of interception of, wire or oral communications involving any of the same persons, facilities, or places specified in this affidavit.

5. I have coordinated and personally participated in this investigation into possible violations of Section 841 of Title 21, United States Code, and violations of Section 1952, 2314, 371, 1962, and 1963 of Title 18, United States Code, by Eddie Riveira, also known as Eddie Rivera; Robert Lo-

pez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong, and others as yet unknown. As a result of my personal participation in this investigation as well as reviewing reports submitted to me by other Agents of the Federal Bureau of Investigation, as well as other state and local law enforcement agencies, I am familiar with all the facts and circumstances involved with this investigation. I allege the facts contained in the following paragraphs to show:

(a) There is probable cause to believe that the subects listed have committed, are committing and will continue to commit offenses as set forth in Paragraph 2 (a) of this affidavit.

(b) There is probable cause to believe that particular wire communications of Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong, and others as yet unknown, concerning these offenses will be obtained through this interception, authorization, for which is applied for herein. In particular, these wire communications will include discussions about the dissemination of confidential information belonging to law enforcement agencies, the sale and distribution of cocaine, marijuana and other controlled suubstances, and Interstate Transportation in Aid of a Narcotics Business, participation in a Racketeer Influenced and Corrupt Organization; the identity of the participants; the precise nature and scope of the illegal activity; and the relationships of the organization with other racketeering groups. In addition, the communications are expected to constitute admissible evidence of the commission of the offenses in violation of Section 2312 of Title 18, United States Code (Transportation of Stolen Vehicles), Section 2316 of Title 18, United States Code (Transportation of Cattle) and Section 2317 of Title 18, United States Code (Sale or receipt of cattle).

(c) Normal investigative procedures have been employed and have proven unsuccessful or will reasonably appear to be unlikely to succeed if tried in developing the precise nature and scope of the illegal activity and the relationships of the organization with other racketeering groups.

Visual surveillances have been instituted by Agents of the Federal Bureau of Investigation and have proved valuable in the identification of the individuals involved in the illegal enterprises. This investigative technique has proved of no other value since the illegal transactions occur in indoor secure locations.

Based upon my experience and the experience of other Special Agents with whom I have consulted it is believed that interrogation of any of the principals of this illegal enterprise would be unproductive. It is likely that the principals would decline to furnish information, or would furnish false information. It is also likely that the principals would notify other principals known and unknown which would cause them to cease their activities or become more circumspect in their activities and would also enable them to destroy evidence or fabricate such evidence or alibis.

Although it is possible that search warrants could be executed to obtain narcotics and stolen property, there is no substantial indication that records of an evidentiary nature needed to show participation of all of the principals would be obtained. Execution of a search warrant would require a notification to the principals of the fact of the investigation.

Two confidential sources and two undercover Special Agents of the Federal Bureau of Investigation have been introduced into this illegal enterprise. Confidential Informant Number One has refused to testify against any of the principals for fear of his safety. The undercover Special Agents have been able to learn that the enterprise had

stolen automobiles and heavy equipment but have been unable to purchase anything. One of the Agents was able to participate in the purchase of a stolen pickup truck, but was unable to purchase cocaine after discussing such a purchase with one of the principals. To date the activities of the confidential sources and undercover Special Agents have been unable to obtain sufficient information to sustain indictment and conviction of all of the principals believed part of this illegal enterprise.

Telephone toll records have been obtained, but these toll records, although useful, and even though in conjunction with other evidence, do not always ascertain the actual participants to the phone calls nor can it be determined whether or not the calls relate to criminal offenses.

(d) There is probable cause to believe that the telephone number 405/336-5404, located at 1317 North Ninth Street, Apartment 10, Perry, Oklahoma, and subscribed to in the name of Eddie Riveira, with an extension of this number located at 517 Cedar Street, Perry, Oklahoma, and telephone number 405/336-5826, the business number of Automotive Enterprises, 517 Cedar Street, Perry, Oklahoma, and subscribed to by Eddie Riveira and Robert Lopez, partners, have been and are being used by Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong, and others as yet unknown, in connection with the commission of the above-described offenses.

6. Facts which establish the necessary probable cause are as follows:

(A) CI Number 1 is an admitted long time associate of Eddie Riveira, also known as Eddie Rivera, and has in the past delivered cocaine from Perry, Oklahoma, to individuals in Oklahoma City, Oklahoma, for Riveira. CI Number 1 has furnished on separate occasions information leading to the recovery of three stolen vehicles.

CI number 1 has furnished accurate information on more than seven occasions to the Federal Bureau of Investigation during the previous three months. This information has been corroborated by independent investigation as well as information furnished by CI Number 2, who is not aware that CI Number 1 is also furnishing information to the Federal Bureau of Investigation. CI Number 1 has in fact furnished information to the Federal Bureau of Investigation regarding the activities of CI Number 2. CI Number 1 advised that he would not testify to any of the above information he furnished for fear of his own safety.

(1) On March 13, 1979, CI Number 1 advised as follows: Eddie Riveira operates an automobile repair shop in Perry, Oklahoma, and deals in stolen automobiles, cattle and narcotics. He has influence with local authorities as well as a District Attorney whom he has personally observed in the company of Riveira on several occasions. Riveira's telephone number for his apartment as well as his business, Automotive Enterprises, is 405/336-5404. CI Number 1 has personally called and talked to Riveira at this number.

(2) During the third week of March, 1979, CI Number 1 advised as follows:

Two unknown white males from Kansas were recently observed by him (CI Number 1) at the apartment of Eddie Riveira in Perry, Oklahoma, picking up some type of narcotics from Riveira. These narcotics were brought from Texas by a Mexican male named Robert (Last Name Unknown). The District Attorney whom Riveira boasted about being able to handle things for him is named Joe Armstrong. Armstrong was formerly a District Attorney in Perry, Oklahoma, but now is a Cleveland County District Attorney in Norman, Oklahoma.

(3) On March 29, 1979, CI Number 1 advised that Eddie Riveira resides at 1317 North Ninth Street, Apartment 10, Perry, Oklahoma. CI Number 1 has been to this residence several times.

(4) CI Number 1 advised as follows:

He was at the residence of Eddie Riveira, 1317 North Ninth Street, Apartment 10, Perry, Oklahoma, during the first week of April, 1979. Among those present were Joe Armstrong, who he knew as the former Noble County District Attorney, and Robert (Last Name Unknown), Riveira's partner, whom he observed driving a red Chevrolet pickup bearing Texas license PE-9258. At the same time he learned that Riveira stores stolen automobiles somewhere on Kellogg Street in Wichita, Kansas.

On April 6, 1979, affiant made an inquiry of the Texas Bureau of Motor Vehicles and determined that 1979 Texas license PE-9258 is registered to Robert Lopez, Post Office Box 54, Pittsburg, Texas, for a 1977 Chevrolet pickup.

(B) CI Number 2 is also an admitted long-time associate of Eddie Riveira. CI Number 2 has furnished information to the Federal Bureau of Investigation which has resulted in local arrests of two individuals for cattle rustling. CI Number 2 has furnished accurate information to the Federal Bureau of Investigation on more than 6 occasions during the last three months. This information has been corroborated by independent investigation as well as information furnished by CI Number 1, who is not aware that CI Number 2 is furnishing information to the Federal Bureau of Investigation. CI Number 2 has in fact furnished information to the Federal Bureau of Investigation regarding the activities of CI Number 1.

(1) On March 20, 1979, CI Number 2 advised as follows:

Eddie Riveira operates a body shop in Perry, Oklahoma, known as Automotive Enterprises. Riveira deals in stolen vehicles, cattle, heavy equipment, and narcotics. Robert (Last Name Unknown), a Mexican male from Pittsburg, Texas, is associated with Riveira in his criminal enterprises. Robert (Last Name Unknown) has a ranch ap-

proximately six miles from Pittsburg and has a barn on the ranch where he stores cars, tractors and trucks.

Riveira travels to Tulsa, Oklahoma, and Dallas, Texas, where he has contacts in his narcotics and theft ring business. He knows of cattle being stolen by Riveira from the Payne County area and taken to Muskogee, Oklahoma.

Riveira contributes heavily to political campaigns and has influence with both a male and female District Attorney in Norman, Oklahoma. The District Attorney or Assistant District Attorney in Perry, Oklahoma, smokes marijuana with Riveira and tells Riveira when the "heat" is coming down on him. He described this individual as being a white male in his 30's with dark hair and approximately 5' 10" tall.

(2) On March 21, 1979, CI Number 2 met Eddie Riveira in his private office located at Automotive Enterprises, 517 Cedar Street, Perry, Oklahoma. Prior to this meeting a body recorder was secreted on the person of CI Number 2 by affiant and this meeting was recorded. A portion of this meeting is summarized below:

Riveira and Robert purchased $75,000.00 worth of drugs and Riveira still has $45,000.00 worth in his possession not yet sold. Most of his money is tied up in these drugs and Riveira needed some cash. He agreed to sell CI Number 2 a 1979 Mercury Cougar for $2,000.00. This automobile was reported stolen by the owner, a female living in Perry, Oklahoma, as an insurance fraud.

Riveira and Robert are partners in Automotive Enterprises, Robert having invested $6,000.00 in the business and Riveira $17,000. They share in the profits accordingly. They are also partners in the sale of drugs and together in the month of January they made $45,000.00 from selling drugs.

Riveira had several head of stolen cattle penned up which he had to release when CI Number 2 did not appear to help him complete the theft as previously arranged.

Riveira is planning on buying and selling stolen automobile parts through his body shop. He referred to these parts as "clips".

Riveira is friendly with an Assistant District Attorney presently working in Norman, Oklahoma, who served in the same capacity in Perry, Oklahoma. He talked about paying for a big party for this individual that was held in Oklahoma City, Oklahoma. He also talked about making car payments for this individual when asked to do so. When CI Number 2 referred to this individual as Armstrong he acknowledged this was the individual. He also said that he was thinking of moving his operation to Norman, Oklahoma, because "how can you be arrested when the DA won't prosecute?"

(3) On March 23, 1979, CI Number 2 furnished the following information to a Special Agent of the Federal Bureau of Investigation, at Oklahoma City, Oklahoma:

On March 22, 1979, he (CI Number 2) proceeded to Wichita, Kansas, and obtained a 1979 Mercury Cougar which he had purchased from Eddie Riveira for $3,000. Part of this money, however, was to be applied to an old debt for which he was obligated to Riveira. This vehicle was obtained from an individual known to him as Mike Webster, who resided at the Fox Run Apartments off Kellogg Street in Wichita. Webster had the Cougar stored in the 5400 or 5500 block of Flore Street in a garage. There was also another automobile stored at the same location, but he was unable to determine what make or see a license number. The title to the Cougar was in the automobile at the time it was picked up by him.

Later that same day, he (CI Number 2) observed Webster and an individual known to him as Dave Latton,

at the residence of Riveira in Perry, Oklahoma. These two individuals picked up some narcotics which he thought to be marijuana from Riveira and which they indicated that they were going to take back to Kansas. From conversations of these individuals he learned that approximately 100 pounds or more of marijuana, had been brought to Perry, Oklahoma, that day by Robert (Last Name Unknown).

During this same time, he learned that Joe Armstrong, the Assistant District Attorney in Norman, Oklahoma, may possibly attempt to acquire a judgeship in Perry, Oklahoma. Riveira and Robert (Last Name Unknown), mentioned above, intended to put up $8,000 apiece in an attempt to have Armstrong elected.

Riveira and Latton talked about the owner of the Cougar giving them the Cougar in an apparent insurance fraud. An individual known as Lloyd (Last Name Unknown), who is a cousin of Latton and who owns a wrecker service and Latton himself, both dated the owner of the car, who was described as a white, blonde, female. She reportedly works in a truck stop near Perry.

(4) On May 21, 1979, CI Number 2 telephonically contacted Eddie Riveira, at his place of business, Automotive Enterprises, 517 Cedar Street, Perry, Oklahoma, telephone number 336-5404. During the conversation with Riveira, he indicated that he had cocaine for sale for $1,700 an ounce. After consultation with affiant, CI Number 2 recontacted Riveira at the same number and indicated he wished to purchase some of this cocaine later on the afternoon of the same date. That afternoon CI Number 2, affiant and another Special Agent of the Federal Bureau of Investigation, traveled in two separate vehicles to Perry, Oklahoma. Just prior to his meeting with Riveira, CI Number 2 was furnished $3,400 and a transmitter was secreted on his body by affiant. Also prior to his meeting with Riveira a search of his clothing was conducted to

determine that no narcotics were in his possession. CI Number 2 then met with Riveira in his private office located inside Automotive Enterprises, 517 Cedar Street, Perry, Oklahoma, and later the two of them traveled together in CI Number 2's automobile to Riveira's apartment, number 10, located at 1317 North 9th Street, Perry, Oklahoma, where the transaction was completed. Both CI Number 2 and Riveira were observed traveling from Riveira's place of business to his apartment by affiant and another Special Agent of the Federal Bureau of Investigation.

The transaction was recorded and the following information was extracted from that recording:

Riveira has buyers in Texas for expensive horses and is willing to pay immediate cash for any horses that CI Number 2 would deliver to him.

An individual known as Sherfield is currently in jail in Wewoka, Oklahoma, and is a former associate of Riveira's. Riveira indicated that he has heard that Sherfield was doing some informing about their previous dealings and wanted CI Number 2 to contact Sherfield and advise him to discontinue furnishing information to authorities. He further indicated that if this was not done he would take some action against Sherfield, possibly having him "hit".

After proceeding to Riveira's apartment, they joined two other individuals referred to on the tape as Johnson and Max. Max talks about buying the cocaine in Las Vegas that Riveira sold to CI Number 2. They also talk about trading some of this cocaine to unknown individuals for hashish. They also discuss that they have some highly potent marijuana in their possession, which has come from the State of Hawaii.

The transaction was concluded with CI Number 2 purchasing one and one-third ounces of cocaine, for a total of $2,275.

On May 21, 1979, a field test of the substance purchased that day by CI Number 2 was conducted in the Oklahoma City Office of the FBI. The results were presumptively determined to be cocaine.

CI Number 2 advised that he knew Johnson as Kenneth Johnson, a long-time associate of Eddie Riveira. He did not know Max, but described him as a white male, in his 40s, approximately 6 feet tall.

Both CI Number 1 and CI Number 2 advised that their normal dealings with Riveira generally are as follows:

Riveira either telephonically contacts them or they telephonically contact him at his telephone number 336-5404. Very little of the dealing is discussed over the telephone, as he normally insists that they come in person to Perry, Oklahoma. They usually meet in Riveira's private office located in his body shop known as Automotive Enterprises, 517 Cedar Street, and conduct their business transactions therein. Money usually changes hands in this office and then Riveira leaves and produces the contraband at a later time. Both CI Number 1 and Number 2 advise that 336-5404 telephone number rings at both Automotive Enterprises and Riveira's apartment located at 1317 North 9th Street, Apartment Number 10, Perry, Oklahoma.

Both CI's have contacted Riveira at number 336-5404 during business hours at Automotive Enterprises as well as after business hours at his apartment at the same number.

CI Number 2 advised that Riveira or his associates would probably harm him if they discovered he was furnishing information to the Federal Bureau of Investigation.

(5) On April 18, 1979, the Chief of Police, Perry, Oklahoma, furnished the following information to a Special Agent of the Federal Bureau of Investigation:

Kenneth Johnson, a white male, 38 to 40 years old, has a reputation for being a fence in the Perry, Oklahoma,

area. Johnson formerly lived in Las Vegas, Nevada, and is a close associate of Eddie Riveira.

He has seen another individual in the company of Eddie Riveira in recent days. This individual has been seen driving a Chevrolet Corvette bearing 1979 Idaho License 4/C 20-734. He described this individual as a white male, age 40, medium build, grey hair, and a mustache. He checked this license through the Idaho Bureau of Motor Vehicles and determined that Idaho license 4/C 20-734 was registered to Max Abiledinger, Post Office Box 233, Burley, Idaho, for a Chevrolet Corvette.

(6) On March 23, 1979, a Special Agent of the Federal Bureau of Investigation, who is normally assigned to work in Perry, Oklahoma, advised that Joe Armstrong was known to him as a former assistant Noble County District Attorney, who worked and had an office in the Noble County Courthouse in Perry, Oklahoma. He also advised that Armstrong no longer worked there, but was presently employed in the same capacity in Norman, Oklahoma, for the Cleveland County District Attorney's Office.

(7) On March 15, 1979, affiant, acting in an undercover capacity, met with Eddie Riveira in his private office at his place of business, Automotive Enterprises, 517 Cedar Street, Perry, Oklahoma. The purpose of this meeting was to attempt to make an undercover buy of stolen property. Affiant was carrying a secreted transmitter and the entire conversation was recorded. During the conversation, Riveira advised he could obtain stolen automobiles, farm tractors, bulldozers, and other heavy equipment as well as oil field equipment.

Riveira's private office is at the front of the building isolated from the body shop area itself. To get into the office, you must pass through a reception area where a secretary is normally in attendance. The office can be completely closed off from the remainder of the building by closing a door which can be locked.

(8) On April 10, 1979, another Special Agent of the Federal Bureau of Investigation, acting in an undercover capacity, met with Eddie Riveira and Robert Lopez at Riveira's residence, 1317 North Ninth Street, Apartment 10, Perry, Oklahoma. The purpose of this meeting was to attempt to make an undercover buy from Lopez and Riveira of a Chevrolet pickup which had been stolen in Texas. The buy of this pickup was not consummated. During the meeting Riveira and Lopez attempted to get the Agent to assist them in stealing 25 head of cattle and 5 horses.

(9) On April 16, 1979, this same Special Agent of the Federal Bureau of Investigation met with Eddie Riveira in his private office located within Automotive Enterprises, 517 Cedar Street, Perry, Oklahoma. The purpose of this meeting was to consummate an undercover buy of a stolen 1979 Ford pickup. Riveira was paid $2,500 for the pickup in his office and then instructed the Agent to get a room in a local motel and recontact him later that night. Riveira delivered the pickup to the motel later that night.

The transaction was recorded and during the conversation, Riveira offered the Agent any amount of cocaine he wanted for $2,000, an ounce or $70,000 a kilo.

Affiant had a record check conducted through National Crime Information Center and it was determined that the 1979 Mercury Cougar and the 1979 Ford pickup were both stolen.

(10) On April 26, 1979, this same Special Agent of the Federal Bureau of Investigation telephonically contacted Eddie Riveira at telephone number 336-5404. The Agent indicated that he wished to buy two ounces of cocaine. Riveira stated that he would attempt to locate some cocaine for him. The Agent was never able to consummate the cocaine buy. Riveira later advised CI Number 2 that he did not want to make any narcotics deals with any new people.

(11) On May 10, 1979, pursuant to a subpoena duces tecum, toll records for telephone number 405/336-5404, subscribed to by Eddie Riveira, 1317 North Ninth Street, Apartment 10, Perry, Oklahoma, were obtained. These records reflect numerous interstate and intrastate calls from this number. Among the numbers called were the following:

450/364-4871 on February 14, 1979; February 21, 1979; and April 8, 1979. Records reflect this number subscribed to by P. Joseph Armstrong, 1607 Abe Martin Drive, Norman, Oklahoma.

(12) On June 1, 1979, a Special Agent of the Federal Bureau of Investigation, who normally works in Norman, Oklahoma, advised that P. Joseph Armstrong is also known to him as Joe Armstrong and is a Cleveland County Assistant District Attorney. He further advised that the initial "P" stands for Patrick.

405/321-8268 on April 3, 1979. Records reflect this number subscribed to by the Cleveland County District Attorney's Office, Norman, Oklahoma.

214/856-2307 on February 21, 1979; February 25, 1979 (2); March 4, 1979; March 5, 1979; March 15, 1979; March 20, 1979; March 21, 1979 (2); March 22, 1979; March 26, 1979; March 27, 1979 (2); March 28, 1979; March 29, 1979 (2); and April 2, 1979. Records reflect this number subscribed to by Robert Lopez, Leesburg Highway, Pittsburg, Texas.

512/686-0327 on April 6, 1979 (2). Records reflect this number subscribed to by Rudolfo Tomez, 2521 Gumwood, McAllen, Texas.

(13) On May 31, 1979, the Drug Enforcement Agency (DEA), Chicago, Illilnois, advised the Federal Bureau of Investigation, Chicago, Illinois, that toll records of Jesus Jaime Jazquez-Herrera, Aurora, Illinois, currently under investigation by DEA, Chicago, for involvement

with the "Herrera Organization", the major Mexican heroin smuggling operation in Chicago, reflects calls to Rudolfo Tomez at McAllen, Texas.

512/485-2662 on February 20, 1979, and February 21, 1979. Records reflect this number subscribed to by Jose Montelongo, Sullivan City, Texas.

(14) On May 31, 1979, DEA, Chicago, Illinois, advises the Federal Bureau of Investigation, Chicago, Illinois, that Jose Montelongo was arrested October, 1974, at McAllen, Texas, for possession of 500 pounds of marijuana.

(15) On May 31, 1979, a Special Agent of the Federal Bureau of Investigation, Oklahoma City, Oklahoma, had records reviewed which reflect telephone number 405/336-5826 is listed to Eddie Riveira and Robert Lopez, doing business as Automotive Enterprises, 517 Cedar Street, Perry, Oklahoma. Service was started February 20, 1979.

(16) On June 6, 1979, CI Number 2, furnished the following information to a Special Agent of the Federal Bureau of Investigation:

On June 5, 1979, he met with Eddie Riveira in Perry, Oklahoma. Riveira, at this time, advised him that he, Riveira was "sitting on twelve pounds of coke". Riveira agreed to sell him more "coke" as soon as he, CI Number 2, furnished the money. Riveira also told him that Joe Armstrong, the Assistant District Attorney in Norman, Oklahoma, was setting up a millionaire in Chickasha, Oklahoma, to "rip off".

(17) On June 1, 1979, Frank Borlen, Oklahoma State Bureau of Investigation, Enid, Oklahoma, advised as follows:

Cleveland County District Attorney Kay Huff, Norman, Oklahoma, requested that his organization conduct an investigation into the activities of one of her assistants, Joseph Armstrong. She had received allegations

that while Armstrong was an Assistant District Attorney in Perry, Oklahoma, he was instrumental in the theft of a large quantity of marijuana being held for evidence.

(18) On June 11, 1979, tool records were obtained for telephone number 405/336-5826, subscribed to by Eddie Riveira and Robert Lopez, partners, 517 Cedar Street, Perry, Oklahoma. This is the address of Automotive Enterprises.

These records reflect numerous interstate and intrastate calls including some calls identical to numbers called on telephone number 405/336-5404. The following are numbers called from both 405/336-5404 and 405/336-5826:

214/856-2307 subscribed to by Robert Lopez, Leesburg Highway, Pittsburg, Texas;

405/321-8268 subscribed to by the Cleveland County District Attorney's Office, Norman, Oklahoma, and called on April 2, 1979.

(19) On June 14, 1979, CI Number 1 advised as follows:

Eddie Riveira and Joe Armstrong are partners in the sale of narcotics. He saw the two of them together in Riveira's apartment in Perry, Oklahoma, in late 1978, in possession of approximately one pound of cocaine.

Approximately two or three weeks ago, he met Joe Armstrong at night near the University of Oklahoma campus in Norman, Oklahoma. Armstrong wanted him to make a trip to Pittsburg, Texas, and obtain some cocaine from Robert Lopez and bring it back to Armstrong in Norman. During the conversation, Armstrong stated that he could not be arrested since he was a District Attorney and that no one would believe CI Number 1's word against his (Armstrong's). Armstrong was to call him later after he made the arrangements with Lopez, but has not done so to date.

(20) On June 14, 1979, CI Number 2 advised that Riveira had recontacted him that day and wanted him to help rob the millionaire in Chickasha, Oklahoma, the following week.

(21) On June 14, 1979, CI Number 2 advised Riveira had contacted him that day on the telephone from his, Riveira's, place of business and wanted CI Number 2 to come to Perry, Oklahoma, to discuss the robbery of the "old rich man" in Chickasha.

(22) On June 15, 1979, CI Number 2 proceeded to Perry, Oklahoma, and met with Riveira at Automotive Enterprises, 517 Cedar Street. There, Riveira furnished CI Number 2 with three fourths ounce of cocaine. Riveira also advised CI Number 2 that the millionaire to be robbed resided near Orlando, Oklahoma, in Logan County, and not Chickasha. He lived alone in a house near some railroad tracks. Kenneth Johnson also met with CI Number 2 at Automotive Enterprises and was present when Riveira gave cocaine to CI Number 2. Kenneth Johnson advised CI Number 2 that the name of the millionaire to be robbed was a (First Name Unknown) Pfeiffer, who had donated thousands of dollars to a hospital in Stillwater, Oklahoma.

Riveira and Johnson wanted CI Number 2 to rob Pfeiffer that night and force him to give CI Number 2 money he supposedly kept in the residence. Riveira and Johnson advised CI Number 2 that if it was necessary, he could beat and even kill Pfeiffer. Riveira and Johnson were to receive 50 percent of the money robbed.

(23) On June 18, 1979, it was determined through independent investigation that a Fred Pfeiffer resided in Logan County, near Orlando, Oklahoma; that Pfeiffer was an old man who lived alone and his house was near some railroad tracks.

(24) On June 15, 1979, CI Number 2 called Eddie Riveira at telephone number 405/336-5826, the business

number of Automotive Enterprises, 517 Cedar Street, Perry, Oklahoma, and subscribed to by Eddie Riveira and Robert Lopez, partners. CI Number 2 discussed the purchase of $700.00 worth of cocaine from Riveira as well as the robbery mentioned above over this number.

(25) On June 15, 1979, Charles Yerbio, General Manager, Jackie Cooper Oldsmobile, Inc., Yukon, Oklahoma, advised as follows:

He has been in the automobile business for seventeen years. Part of this time he was employed as a field representative for the Oldsmobile Division of General Motors Corporation. He is thoroughly familiar with the automobile business, including parts. It is his opinion that virtually all automobile parts are manufactured outside the State of Oklahoma.

He is also familar with the term "clip". He described this as either the front end or rear end assembly of an automobile. This is the sheet metal itself minus the motor, wheels and other parts of the automobile that make it run. The cost of these "clips" vary with the make of the automobile, but it would be safe to say that any two "clips" together would be worth more than $5,000.00.

On June 26, 1979, toll records were obtained for telephone number 405/364-4871, subscribed to by P. Joseph Armstrong, 1607 Abe Martin Drive, Norman, Oklahoma. These records were for the period January 23, 1979, through May 16, 1979, and reflect the total of 18 calls to telephone number 405/336-5404, subscribed to by Eddie Riveira, 1317 North Ninth Street, Apartment 10, Perry, Oklahoma, with the most recent being on May 16, 1979.

Pursuant to the provision of Title 18, United States Code, Section 2518 (5), this interception will be conducted in such a way as to minimize the interception of communications not otherwise subject to interception, and will terminate upon attainment of the authorized objectives, or

in any event, at the end of 30 days. In this regard, the monitoring of intercepted wire conversations for telephone numbers 405/336-5404, and 405/336-5826, will immediately terminate when it is determined through voice identification or otherwise that none of the conspirators are participants in the conversation or that the conversation is not criminal in nature.

(s) *Jerry L. Emmons*
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me
this *19th* day of *July*, 1979.

(s) *Ralph G. Thompson*
UNITED STATES DISTRICT JUDGE

APPENDIX D

[First Order of District Court Authorizing Interception of Wire Communications, Dated July 19, 1979. — Caption Omitted in Printing]

ORDER AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS

Application under oath having been made before me by Charles Lee Waters, Assistant United States Attorney for the Western District of Oklahoma, and an "investigative or law enforcement officer" as defined in Section 2510 (7) of Title 18, United States Code, for an order authorizing the interception of wire and oral communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

(a) There is probable cause to believe that Eddie Riveira, Jr. hereinafter referred to as Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong and others as yet unknown have committed and are committing offenses involving the sale and distribution of controlled substances in violation of Section 841 of Title 21, United States Code, and conspiracy to commit such offenses in violation of Section 846 of Title 21, United States Code, and offenses involving Interstate Travel in Aid of Racketeering (narcotics) in violation of Section 1952 of Title 18, United States Code; Interstate Transportation of Stolen Property in violation of Section 2314 of Title 18, United States Code; and Conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code; offenses involving Racketeer Influenced and Corrupt Organizations in violation of Title 18, United States Code, Section 1963, more particularly defined in Section 1962 (c) and 1962 (d), with acts of racketeering as defined in Section 1961 of Title 18, United States Code as follows:

The above described violations of Sections 1952 and 2314 of Title 18, United States Code and violations of Section 841 of Title 21, United States Code and violations of Oklahoma State Statutes relating to robbery and the sale of drugs and narcotics both of which are punishablee by imprisonment for more than one year.

(b) There is probable cause to believe that particular wire communications concerning these offenses will be obtained through the interception, application, for which authorization is herewith applied. In particular, these wire communications will include discussions about the dissemination of confidential information belonging to law enforcement agencies, the sale and distribution of cocaine, marijuana and other controlled substances, and Interstate Transportation in Aid of Narcotics Business, participation in a Racketeer Influenced and Corrupt Organization; the identity of the participants; the precise nature and scope of the illegal activity, and the relationships of the organization with other racketeering groups. In addition, the communications are expected to constitute admissible evidence of the commission of the offenses in violation of Section 2312 of Title 18, United States Code (Transportation of Stolen Vehicles), Section 2316 of Title 18, United States Code (Transportation of Cattle) and Section 2317 of Title 18, United States Code (Sale or Receipt of Cattle).

(c) Normal investigative procedures either have been tried without success and reasonably appear unlikely to succeed if continued or reasonably appear unlikely to succeed if tried.

(d) There is probable cause to believe that the premises at 1317 North Ninth Street, Apartment 10, Perry, Oklahoma, carrying telephone number 405/336-5404, which is subscribed to by Eddie Riveira, also known as Eddie Rivera, the premises located at 517 Cedar Street, Perry, Oklahoma, carrying telephone numbers 405/336-5404, mentioned above, and 405/336-5826, which is the business num-

ber of Automotive Enterprises at 517 Cedar Street, Perry, Oklahoma, and subscribed to by Eddie Riveira and Robert Lopez, partners, are being used by Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong, and others as yet unknown, in connection with the commission of the above-stated offenses.

WHEREFORE, it is hereby ordered that Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized, pursuant to application authorized by the Assistant Attorney General of the Criminal Division, The Honorable Phillips B. Heymann, who has been specifically designated by the Attorney General of the United States, to exercise the power conferred on him by Section 2516 of Title 18, United States Code, to intercept wire communications of Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong and others as yet unknown, concerning the above-described offenses to and from telephone number 405/336-5404, appearing in two locations, 1317 North Ninth Street, Apartment 10, Perry, Oklahoma, and 517 Cedar Street, Perry, Oklahoma, and subscribed to in the name of Eddie Riveira, and to and from telephone number 405/336-5826, the business number of Automotive Enterprises, 517 Cedar Street, Perry, Oklahoma, and subscribed to by Eddie Riveira and Robert Lopez, partners.

Such interception shall not automatically terminate when the type of communication described above in paragraph (b) has first been obtained but shall continue until communications are intercepted which reveal the manner in which Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong also known as Joe Armstrong and others as yet unknown participate in offenses involving the sale and distribution of controlled substances in violation of Section 841 of Title 21, United States Code, and conspiracy to com-

mit such offenses in violation of Section 846 of Title 21, United States Code, and offenses involving Interstate Travel in Aid of Racketeering (narcotics) in violation of Section 1952 of Title 18, United States Code; Interstate Transportation of Stolen Property in violation of Section 2314 of Title 18, United States Code; and Conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code; offenses involving Racketeer Influenced and Corrupt Organizations in violation of Title 18, United States Code, Section 1963, more particularly defined in Sections 1962 (c) and 1962 (d), with acts of racketeering as defined in Section 1961 of Title 18, United States Code as follows: The above described violations of Section 1952 and 2314 of Title 18, United States Code and violations of Section 841 of Title 21, United States Code and violations of Oklahoma State Statutes relating to robbery and the sale of drugs and narcotics, both of which are punishable by imprisonment for more than one year, which reveal the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of thirty (30) days from the date of this order, whichever is earlier.

It is further ordered, upon request of applicant, that the Southwestern Bell Telephone Company, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the Southwestern Bell Telephone Company to be compensated for by the applicant at the prevailing rates.

PROVIDING THAT, this authorization to intercept wire communications shall be executed as soon as practicable after signing of this order and shall be conducted

in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon atainment of the authorized objectives or, in any event, at the end of thirty (30) days from the date of this order.

PROVIDING ALSO, that the United States Attorney, or an Assistant United States Attorney, shall provide the Court with a report on or about the fifth, tenth, fifteenth, twentieth, and twenty-fifth days following the date of this order showing what progress has been made toward achievement of the authorized objectives and the need for continued interception.

Dated this *19th* day of *July*, 1979.

(s) *Ralph G. Thompson*
U. S. DISTRICT JUDGE

APPENDIX E

[Second Application for Wiretap Order, Filed Nov. 19, in U. S. District Court. — Caption Omitted in Printing]

APPLICATION

Charles Lee Waters, Assistant United States Attorney for the Western District of Oklahoma, being duly sworn, states:

1. He is an "investigative or law enforcement officer — of the United States" within the meaning of Section 2510 (7) of Title 18, United States Code, that is—an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable Benjamin Civiletti, has authorized this Application for an Order authorizing the interception of wire communications and oral communications. Attached to this Application as Exhibit A are the letter of notification of approval from the Criminal Division and a copy of the Attorney General's memorandum of authorization.

3. This Application seeks authorization to intercept wire communications of Eddie Riveira, Jr., hereinafter referred to as Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong; Rhonda Vasser, Dennis Black, and others as yet unknown concerning offenses involving the sale and distribution of controlled substances in violation of Section 841 of Title 21, United States Code, and conspiracy to commit such offenses in violation of Section 846 of Title 21, United States Code, and offenses involving Interstate Travel in Aid of Racketeering (narcotics) in violation of Section 1952 of Title 18, United States Code; Interstate Transportation of Stolen

Property in violation of Section 2314 of Title 18, United States Code; and Conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code; offenses involving Racketeer Influenced and Corrupt Organizations in violation of Title 18, United States Code, Section 1963, more particularly defined in Sections 1962 (c) and 1962 (d), with acts of racketeering as defined in Section 1961 of Title 18, United States Code as follows: The above described violations of Sections 1952 and 2314 of Title 18, United States Code, and violations of Section 841 of Title 21, United States Code, and violations of Oklahoma State Statutes relating to robbery (Section 798 of Title 18, Oklahoma Statutes Annotated), and the sale of drugs and narcotics (Section 2-401 of Title 63, Oklahoma Statutes Annotated), both of which are punishable by imprisonment for more than one year, which have been committed and are being committed by Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong; Rhonda Vasser, Dennis Black, and others as yet unknown.

4. He has discussed all the circumstances of the above offenses with Special Agent Jerry L. Emmons of the Oklahoma City Office of the Federal Bureau of Investigation, who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent Jerry L. Emmons (attached to this Application as Exhibit B and incorporated by reference herein), which alleges the facts therein in order to show that:

(a) There is probable cause to believe that Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong also known as Joe Armstrong; Rhonda Vasser, Dennis Black, and others as yet unknown, have committed and are committing offenses involving violations of Sections 1952, 2314, 371, and 1963 of Title 18, and violations of Sections 841 and 846 of Title 21, United States Code.

(b) There is probable cause to believe that particular wire communications of Eddie Riveira also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong also known as Joe Armstrong; Rhonda Vasser, and others as yet unknown concerning these offenses will be obtained through the interception for which authorization is herewith applied. In particular, these wire communications will include discussions about the dissemination of confidential information belonging to law enforcement agencies, the sale and distribution of cocaine, marijuana and other controlled substances, and Interstate Transportation in Aid of a Narcotics Business, participation in a Racketeer Influenced and Corrupt Organization; the identity of the participants; the precise nature and scope of the illegal activity; and the relationships of the organization with other racketeering groups. In addition, the communications are expected to constitute admissible evidence of the commission of the offenses in violation of Section 2312 of Title 18, United States Code (Transportation of Stolen Vehicles), Section 2316 of Title 18, United States Code (Transportation of Cattle) and Section 2317 of Title 18, United States Code (Sale or Receipt of Cattle).

(c) The attached affidavit contains a full and complete statement explaining why normal investigative procedures either have been tried and have failed or reasonably appear unlikely to succeed if tried.

(d) There is probable cause to believe that to and from telephone number 405/336-5404, appearing in two locations, 1317 North Ninth Street, Apartment 10, Perry, Oklahoma, and Automotive Enterprises, 517 Cedar Street, Perry Oklahoma, and subscribed to in the name of Eddie Riveira, have been used and are bing used by Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong also known as Joe Armstrong; Rhonda Vasser, Dennis Black, and others as

yet unknown in connection with the commission of the above-described offenses.

5. On July 19, 1979, the Honorable Ralph G. Thompson, United States District Judge for the Western District of Oklahoma, authorized the interception for a 30-day period of the wire communications of Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong, and others as yet unknown concerning offenses set forth in paragraph 4.(a) of this Application to and from telephone numbers 405/336-5404, mentioned above, and 405/336-5826, which has now been discontinued, and was formerly the business number of Automatic Enterprises, in Order Number M-59.

WHEREFORE, your affiant believes that probable cause exists to believe that Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong; Rhonda Vasser, Dennis Black, and others as yet unknown, are engaged in the commission of offenses involving the sale and distribution of controlled substances in violation of Section 841 of Title 21, United States Code, and conspiracy to commit such offenses in violation of Section 846 of Title 21 United States Code and offenses involving Interstate Travel in Aid of Racketeering (narcotics) in violation of Section 1952 of Title 18, United States Code, offenses involving the Interstate Transportation of Stolen Property in violation of Section 2314 of Title 18, United States Code; and Conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code; offenses involving Racketeer Influenced and Corrupt Organizations in violation of Section 371 of Title 18, United States Code; offenses involving Racketeer Influenced and Corrupt Organizations in violation of Title 18, United States Code, Section 1963, more particularly defined in Sections 1962 (c) and 1962 (d), with acts of Racketeering as defined in Section 1961 of Title 18, United States Code as follows:

The above described violations of Sections 1952 and 2314 of Title 18, United States Code and violations of Sections 841 of Title 21, United States Code and violations of Oklahoma State Statutes relating to robbery, (Section 798 of Title 18, Oklahoma Statutes Annotated) and the sale of drugs and narcotics (Section 2-401 of Title 63, Oklahoma Statutes Annotated), both of which are punishable by imprisonment for more than one year, that Eddie Riveira also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong; Rhonda Vasser, Dennis Black, and others as yet unknown, are using the premises at 1317 North Ninth Street, Apartment 10, Perry, Oklahoma, carrying telephone number 405/336-5404, which is subscribed to by Eddie Riveira, also known as Eddie Rivera, the premises known as Automotive Enterprises located at 517 Cedar Street, Perry, Oklahoma, carrying telephone number 405/336-5404, mentioned above, in connection with the commission of the above-described offenses; that communications of Eddie Riveira, also known as Eddie Rivera; Robert Lopeez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong; Rhonda Vasser, Dennis Black, and others as yet unknown concerning these offenses will be intercepted to and from the above-described telephones; and that normal investigative procedures appear unlikely to succeed.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent Jerry L. Emmons, attached hereto, affiant requests this court to issue an order pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation to intercept wire communications to and from telephone number 405/336-5404 appearing in two locations 1317 North Ninth Street, Apartment 10, Perry, Oklahoma, and at Automotive Enterprises, 517 Cedar Street, Perry, Oklahoma, and subscribed to in the name of Eddie Riveira until communi-

cations are intercepted which reveal the manner in which Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong; Rhonda Vasser, Dennis Black, and others as yet unknown participate in the commission of offenses involving the sale and distribution of controlled substances in violation of Section 841 of Title 21, United States Code, and conspiracy to commit such offenses in violation of Section 846 of Title 21, United States Code, and offenses involving Interstate Travel in Aid of Racketeering (narcotics) in violation of Section 1952 of Title 18, United States Code; Interstate Transportation of Stolen Property in violation of Section 2314 of Title 18, United States Code; and Conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code; offenses involving Racketeer Influenced and Corrupt Organizations in violation of Title 18, United States Code, Section 1963, more particularly defined in Sections 1962 (c) and 1962 (d), with acts of racketeering as defined in Section 1961 of Title 18, United States Code, as follows:

The above described violations of Section 1952 and 2314 of Title 18, United States Code, and violations of Section 841 of Title 21, United States Code, and violations of Oklahoma State Statutes relating to robbery (Section 798 of Title 18, Oklahoma States Annotated) and the sale of drugs and narcotics (Section 2-401 of Title 63, Oklahoma Statutes Annotated), both of which are punishable by imprisonment for more than one year, and which reveal the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the date of that order whichever is earlier.

It is further requested that this court issue an order pursuant to Section 2518 (4) (e) of Title 18, United States Code, directing that the Southwestern Bell Telephone Company, a communication common carrier as defined in Sec-

tion 2510 (10) of Title 18, United States Code, shall furnish the applicant forthwith all information facilities, and technical assistance necessary to accomplish the interception unobstrusively and with a minimum of interference with the services that such a carrier is according the person whosee communications are to be intercepted, the furnishing of such facilities or technical assistance by the Southwestern Bell Telephone Company to be compensated for by the applicant at the prevailing rates.

(s) *Charles Lee Waters*
Assistant United States Attorney

Subscribed and sworn to before me this 12th day of *Sept.*, 1979.

(s) *Ralph G. Thompson*
U. S. DISTRICT JUDGE

EXHIBIT "A"

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

Honorable Larry Patton
United States Attorney
Western District of Oklahoma
Oklahoma City, Oklahoma 73102

Dear Mr. Patton:

This is to advise you that pursuant to the power delegated to him by special designation by the Attorney General under the authority vested in him by Section 2516 of Title 18, United States Code, the Assistant Attorney General of the Criminal Division has authorized an application to be made to a Federal judge of competent jurisdiction for an order under Section 2518 of Title 18, United States Code, authorizing the continued interception of wire communications for a fifteen (15) day period, to and from the tele-

phones bearing the number 405-336-5826 located at 517 Cedar Street, Perry, Oklahoma, and number 405-336-5404 located at both Apartment 10, 1317 North Ninth Street, Perry, Oklahoma, and 517 Cedar Street, Perry, Oklahoma, in connection with the investigation into possible violations of Title 18, United States Code, Sections 1952, 1963, 2314, and 371, and Title 21, United States Code, Sections 841 and 846, by Eddie Rivera, Jr., Robert Lopez, Kenneth Johnson, Max Abiledinger, P. Joseph Armstrong, Rhonda Vasser, Dennis Black, and others as yet unknown. A copy of the Attorney General's order specially designating the Assistant Attorney General in charge of the Criminal Division to authorize applications for interception orders of this nature and a copy of the Assistant Attorney General's memorandum of authorization are attached hereto.

Accordingly, you or any other attorney on your staff who is an investigative or law enforcement officer of the United States within the meaning of Section 2510(7) of Title 18, United States Code, are authorized to make the above-described application.

It should also be noted that the interception order contains a provision limiting the monitoring of communications to specified conditions. The agents conducting the interception should be instructed to familiarize themselves with these limitations and to comply therewith.

Very truly yours,

Philip B. Heymann
Assistant Attorney General
Criminal Division

By: (s) *Philip Wilens*
Philip Wilens, Director
Office of Enforcement Operations
Criminal Division

Enclosures

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C. 20530

SPECIAL DESIGNATION OF ASSISTANT ATTORNEYS GENERAL TO AUTHORIZE APPLICATIONS FOR COURT ORDERS AND TO APPROVE EMERGENCY INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS UNDER CHAPTER 119, TITLE 18, UNITED STATES CODE

Order No. 799-78

By virtue of the authority vested in me by 28 U.S.C. 509, 510, 5 U.S.C. 301, and 18 U.S.C. 2516, 2518(7), I hereby specially designate the Assistant Attorney General in charge of the Criminal Division, the Assistant Attorney General in charge of the Tax Division, and the Assistant Attorney General in charge of the Office of Legal Counsel (1) to exercise the power conferred by Section 2516 of Title 18, United States Code, to authorize applications to a Federal judge of competent jurisdiction for orders authorizing the interception of wire or oral communications by the Federal Bureau of Investigation or a Federal agency having responsibility for the investigation of the offense as to which such application is made, when such interception may provide evidence of any of the offenses specified in Section 2516 of Title 18, United States Code, and (2) when I am not in the District of Columbia or am otherwise not available, to exercise the power conferred by Section 2518 (7) of Title 18, United States Code, to approve an emergency interception of wire or oral communications in accordance with the statutory requirements. *Provided*, that the Assistant Attorney General in charge of the Tax Division is authorized to exercise the power herein conferred only when the Assistant Attorney General in charge of the Criminal Division is not in the District of Columbia or is otherwise not available. *Provided further*, that the Assistant Attorney General in charge of the Office of Legal Counsel is authorized to exercise the power herein con-

ferred only when both the Assistant Attorney General in charge of the Criminal Division and the Assistant Attorney General in charge of the Tax Division are not in the District of Columbia or are otherwise not available.

Order No. 692-77 of February 18, 1977 is revoked.
Date: August 15, 1978

(s) *Griffin B. Bell*
Attorney General

UNITED STATES GOVERNMENT

Memorandum

DATE: SEP 10 1979

TO: Philip Wilens, Director
Office of Enforcement Operations
Criminal Division

FROM: Assistant Attorney General
Criminal Division

SUBJECT: Authorization for Interception
Order Application

This is with regard to your recommendation that I authorize an application to a Federal judge of competent jurisdiction for an order under Title 18, United States Code, Section 2518, authorizing the continued interception of wire communications for a fifteen (15) day period, to and from the telephones bearing the number 405-336-5826 located at 517 Cedar Street, Perry, Oklahoma, and number 405-336-5404 located at both Apartment 10, 1317 North Ninth Street, Perry, Oklahoma, and 517 Cedar Street, Perry, Oklahoma, in connection with the investigation into possible violations of Title 18, United States Code, Sections 1952, 1962, 1963, 2314, and 371, and Title 21, United States Code, Sections 841 and 846, by Eddie Rivera, Jr., Robert Lopez, Kenneth

Johnson, Max Abiledinger, P. Joseph Armstrong, Rhonda Vasser, Dennis Black, and others as yet unknown.

By virtue of the authority vested in him by Section 2516 of Title 18, United States Code, the Attorney General of the United States has by Order Number 799-78, dated August 15, 1978, specially designated me to authorize applications for court orders authorizing the interception of wire or oral communications. Accordingly, under the power delegated to me by the special designation of the Attorney General, I hereby authorize the above-described application to be made by any investigative or law enforcement officer of the United States as defined in Section 2510(7) of Title 18, United States Code.

(s) *Philip B. Heymann*
Assistant Attorney General
Criminal Division

Date *Sept. 10, 1979*

EXHIBIT "B"

[Caption Omitted in Printing]

AFFIDAVIT

Jerry Emmons, Special Agent, Oklahoma City Office, Federal Bureau of Investigation, United States Department of Justice, being duly sworn, state:

1. I am a Special Agent of the Federal Bureau of Investigation and have been so employed since August 8, 1967. I am an "Investigator, a law enforcement officer of the United States", within the meaning of Section 2510(7) of Title 18, United States Code. That is, an officer of the United States who is empowered by law to conduct investigations and to make arrests for offenses enumerated in Section 2516 of Title 18, United States Code.

2. This affidavit is submitted in support of an application for an order authorizing the interception of wire communications for a 15-day period under Section 2518 of Title 18, United States Code, of Eddie Riveria, Jr., hereinafter referred to as Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abilledinger; and P. Joseph Armstrong also known as Joe Armstrong, Rhonda Vasser, Dennis Black, and others yet unknown, to and from telephone number 405/336-5404, appearing in two locations, 1317 North Ninth Street Apartment 10, Perry, Oklahoma, and 517 Cedar Street, Perry, Oklahoma, and subscribed to in the name of Eddie Riveira, concerning offenses enumerated in Section 2517 of Title 18, United States Code, that is:

(a) Offenses involving the sale and distribution of controlled substances, in violation of Section 841 of Title 21, United States Code, and conspiracy to commit such offenses in violation of Section 846 of Title 21, United States Code, and offenses involving Interstate Travel in Aid of Racketeering (narcotics) in violation of Section 1952 of Title 18, United States Code; and conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code; offenses involving Racketeer Influenced and Corrupt Organizations in violation of Title 18, United States Code, Section 1963, more particularly defined in Sections 1962 (c) and 1962 (d), with acts of racketeering as defined in Section 1961 of Title 18, United States Code as follows:

The above described violations of Section 1952 and 2314 (Interstate Transportation of Stolen Property) of Title 18, United States Code and violations of Section 841 of Title 21, United States Code and violations of Oklahoma State statutes relating to robbery (Section 798 of Title 18, Oklahoma Statutes Annotated), and the sale of drugs and narcotics, (Section 2-401 of Title 63, Oklahoma Statutes Annotated), both of which are punishable by imprisonment for more than one year, which offenses have been com-

mitted by, are being committed and will be committed by Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; and P. Joseph Armstrong, also known as Joe Armstrong, Rhonda Vasser, Dennis Black, and others as yet unknown.

3. I have coordinated and personally participated in this investigation into possible violations of Section 1952, 2314, 371, 1962, and 1963 of Title 18, United States Code, by Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson, Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong; Rhonda Vasser, Dennis Black, and others as yet unknown. As a result of my personal participation in this investigation as well as reviewing reports submitted to me by other Agents of the Federal Bureau of Investigation, as well as other state and local law enforcement agencies, I am familiar with all the facts and circumstances involved with this investigation. I alleged the facts contained in the following paragraphs to show:

a. There is probable cause to believe that the subjects listed have committed, are committing and will continue to commit offenses as set forth in Paragraph 2(a) of this affidavit.

There is probable cause to believe that particular wire communications of Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson, Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong; Rhonda Vasser, Dennis Black, and others as yet unknown, concerning these offenses will be obtained through this interception, authorization for which is applied for herein. In particular, these wire communications will include discussions about the dissemination of confidential information belonging to law enforcement agencies, the sale and distribution of cocaine, marijuana, and other controlled substances, and Interstate Transportation in Aid of Narcotics Business, participation in a Racketeer Influenced and Cor-

rupt Organization; the identity of the participants; the precise nature and scope of the illegal activity; and the relationships of the organization with other racketeering groups. In addition; the communications are expected to constitute admissible evidence of the commission of the offenses in violation of Section 2312 of Title 18, United States Code (Transportation of Stolen Vehicles), Section 2316 of Title 18, United States Code, (Transportation of Cattle) and Section 2317 of Title 18, United States Code (Sale or receipt of cattle).

c. There is probable cause to believe that wire communications to and from telephone number 405/336-5404 appearing in 1317 North Ninth Street, Apartment 10, Perry, Oklahoma, and 517 Cedar Street, Perry, Oklahoma, and subscribed to in the name of Eddie Riveria, are being used and will continue to be used in carrying out and in furtherance of the aforementioned violations.

d. On July 19, 1979, the Honorable Ralph G. Thompson, United States District Judge for the Western District of Oklahoma, authorized the interception for a 30-day period of the wire communications of Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; and P. Joseph Armstrong, concerning offenses set forth in paragraph 2(a) of this affidavit in order number M-59. A copy of the affidavit executed by your affiant in that matter is attached hereto as Exhibit B(1) and incorporated by reference herein.

PROBABLE CAUSE

4. On July 19, 1979, upon application of United States Attorney Larry D. Patton, Western District of Oklahoma, an order was issued by the Honorable Ralph G. Thompson, United States District Judge for the Western District of Oklahoma, authorizing the interception for a 30-day period of the wire communications of Eddie Riveira, also known as Eddie Rivera; Robert Lopez, Kenneth Johnson; Max

Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong, and others as yet unknown, to and from telephone number 405/336-5404, appearing in two locations, 1317 North Ninth Street, Apartment 10, Perry, Oklahoma, and subscribed to in the name of Eddie Riveira, and to and from telephone number 405/336-5826, the business number of Automotive Enterprises, 517 Cedar Street, Perry, Oklahoma, and subscribed to by Eddie Riveira and Robert Lopez, partners. The summaries of intercepted communications set forth herein are derived from the electronic surveillance authorized by Judge Thompson on July 19, 1979, and were compiled by affiant after a careful, thorough review of the entire original tape recording of the summarized conversations. The identification of the individuals intercepted is based upon voice identification, physical surveillance and telephone subscriber information.

5. Based upon my training and experience as a Special Agent of the FBI and consultations with Agents of the Federal Drug Enforcement Administration and the Oklahoma Bureau of Narcotics, the following terminology is set forth as it relates to the below listed summaries:

(a) Eddie refers to Eddie Riveira, Jr.

(b) Max refers to Max Abiledinger.

(c) Robert refers to Robert Lopez.

(d) Armstrong refers to P. Joseph Armstrong or Joe Armstrong.

(e) Kenney refers to Kenneth Johnson.

(f) Rhonda refers to Rhonda Vasser.

(g) Coke and white stuffff refers to cocaine.

(h) OZ is an ounce.

(i) LB or L is a pound.

(j) Key and 22 is a kilo or kilogram.

(k) Rock refers to the texture of cocaine.

(l) Lumbo or Columbian is a type of marijuana.

(m) Greens refer to Placydils, a type of amphetmine. Green also refers to money.

(n) Percentages refer to the purity of the cocaine.

6. Facts which establish the necessary probable cause are summarized as follows:

On July 21, 1979, telephone numbers 405/336-5404 and 405/336-5826 were initially intercepted. Immediately after the recorders were on line a call was recorded from Eddie Riveira to Robert Lopez in Weslaco, Texas. The purpose of this call was to finalize plans for Riveira, Kenneth Johnson, and Max Abiledinger to make a trip to the Texas-Mexican Border to obtain narcotics.

On July 23, 1979, a girlfriend of Max Abiledinger named Jan Litton, made a telephone call to a bar in Billings, Montana. In this conversation she indicated that she and Max were going to bring narcotics to Billings in two or three days after Max's return from South Texas. She also indicated that she and Max were traveling in his personal plane.

On July 24, 1979, the following calls were intercepted:

At 4:56 p.m. a collect call was received on telephone 336-5404 from Pittsburg, Texas. Eddie and Robert discussed a recent trip that the two of them and Kenneth Johnson and Max Abiledinger had taken to South Texas. Eddie wanted Robert to attempt to get 25 greens for him and that he did not care what he had to pay. Eddie stated that they had found one "L" in Colorado, but would not know until the next day if he could obtain it. Eddie also stated he had been attempting to contact Joe Armstrong since Armstrong still had three items which were not named, but that belonged to Riveira.

In addition to the two calls listed above Riveira made three attempts to contact Joe Armstrong both at Armstrong's home in Norman as well as the District Attorney's Office in Norman, Oklahoma.

The following activities were recorded on July 25, 1979, all on telephone number 336-5404:

At 9:59 a.m. Jan Brewer telephoned Eddie Riveira and asked him what he though about "22". Eddie in return asked what the percentage was, which she did not know.

At 1:07 p.m., Eddie received a call from Tom (Last Name Unknown). Eddie asked Tom what he was going to do with the pot he has and that he, Eddie, could handle it for him. Eddie said that Kenney would make all the arrangements. Tom agreed to come to the shop sometime after 5 p.m.

At 6:10 p.m., Eddie received a call from Joe (Last Name Unknown), not (P. Joseph Armstrong), and Eddie asked if he had any. Joe said no, but he would have some on the weekend. Eddie told him that he went down and it was no good but would get some in Florida.

At 9:59 p.m. Eddie called Robert Lopez and they discussed an individual named Pepe who was supposed to bring a sample of some type of narcotics the next day to Robert for approval. Robert thought he was bringing around seven grams and if it was any good Eddie agreed to meet Robert in Denton, Texas to obtain a sample.

On July 26, 1979, the following activities were recorded:

At 3:22 p.m. Eddie Riveira made a business call regarding automobile parts. While waiting for the clerk to check on the parts, he was overheard talking to another unknown male who was nearby. It was hard to distinguish the conversation but Eddie was heard to ask how much money he had coming and the answer was $700 to $800.

Eddie also asked this individual if he was interested in buying what sounded like some type of narcotics. The unknown person answered, "not right at the moment, but possibly sometime later". The next two calls were intercepted on telephone number 336-5404.

At 9:18 a.m., Eddie received a call from Jan Brewer regarding a deal that Joe had made in Colorado. She said it was ready to go and was 55 percent at 84. Eddie said he had turned down 50 percent the other day and Jan said she would be down to talk to him personally.

At 10:29 p.m. Eddie received a call from Robert who said he had not heard back from Pepe. Eddie told him that Max went to Colorado to pick up an "LB". Robert said that he might go to Chicago to buy an OZ to determine how good it was. Eddie said he would probably go with him.

The following activities were recorded on July 27, 1979, all on telephone number 336-5404:

At 3:53 a.m., a call was received by Jessie (Last Name Unknown) who is employed by Eddie Riveira in his body shop. The call was from Pepe and was entirely in Spanish.

At 12:07 p.m., Kenneth Johnson received a call from Tom (Last Name Unknown), who was advised that Max Abiledinger was on his way back and would probably arrive sometime around 6 p.m., that evening. He told Tom there would be plenty. Tom said he had been talking around and that it sounded good.

At 2:13 p.m., Kenneth Johnson received a call from Joline Talley, who asked if she could get a "couple to try". Johnson said he would pick it up later and get it to her.

At 2:38 p.m., Johnson placed a long distance telephone call to Las Vegas, Nevada to an unknown female. He said they had been trying to "buy some" and among the places tried was singer Freddy Fender's place. Apparently they

did not buy any since it was not good quality. Johnson said that he and Max were coming to Vegas, but at the present time Max was somewhere between Colorado and Nevada. He said Max was bringing two or three and had to "pull some stuff from Montana."

The following activities were recorded on July 28, 1979:

At 11:11 a.m., Eddie Riveira placed a call on telephone number 336-5826 to Robert Lopez, who was not in. He asked Lopez's wife if she had heard from Pepe and she said no. Riveira said that a lot of people were waiting for him and wanted Robert to call him back.

At 1:08 p.m., Eddie placed a call from telephone number 336-5404 to Robert asking if he had heard from Pepe. Lopez said he had not. Eddie advised that Max was back and that he had not gotten anything because the "guys wanted too much money". He said Max will pay a good price but that they were wanting 26 for an ounce. Robert said he would call Chicago, because they have it there every week.

The following activities were recorded on July 29, 1979, on telephone number 336-5404:

At 8:28 a.m., Eddie placed a call to Robert asking what he had found out. Robert replied, "he doesn't have any and won't have any until next week".

The following activities were recorded on July 29, 1979, on telephone number 336-5404:

At 9:21 a.m., Eddie called Robert and suggested that they buy some green and have Jan run it back. Eddie suggested they get 50 and asked how much money could he, Robert, come up with. Eddie asked how about the deal with Rudy and Robert indicated he had to make some additional calls.

At 12:18 p.m., Kenney received a call from Tom (Last Name Unknown). Kenney asked how much he needed and Tom replied "I've got an order in for one".

At 4:25 p.m., Eddie received a call from Robert, who advised that a guy would be up Wednesday "with some green". He further advised that the Chicago shipment was due in by Friday. Eddie said he wanted Max to stay around until they could get some stuff and the way they could keep Max in Perry, Oklahoma, was to say that Rudy called and is expecting it in a day or so.

When talking about the person in Chicago, Robert referred to him as the "guy from the heights". He said that the guy had told him that if you buy an ounce, over half of it is rock. Lopez said the stuff is the way Max wants it. The way their conversation was carried on, it appears that Max is dealing heavily in narcotics and Robert and Eddie would like to become partners with him. They talked about putting the body shop up for sale for $25,000 and investing it with Max.

At 10:29 p.m., another call was intercepted between Robert and Eddie in which they talked about Pepe bringing the greens on Wednesday.

On telephone number 336-5826, a conversation was monitored between Eddie and Albert Ramirez in which they agreed to meet and agreed to discuss some money-making deals. Ramirez is alleged to be involved in the trafficking of stolen automobiles in the Oklahoma City area.

On July 31, 1979, the following activities were recorded on telephone number 336-5404:

At 8:36 a.m., Eddie received a call from Robert advising he had talked with the Chicago people. The two of them decided to go up there in an attempt to make a buy and Eddie asked Robert to make the reservations.

At 9:07 a.m. Eddie called Robert back and was told that he, Robert, was waiting on a call from the Chicago people to receive details and prices.

At 1:21 p.m. Eddie called and spoke to Robert's wife who advised that Robert had in fact received a call from the guy in Chicago and that she had made reservations for both Eddie and Robert to fly to Chicago from Oklahoma City on August 1, 1979.

At 7:25 p.m., an individual named Steve Layton called telling Eddie everything was gone but he had not been paid for all the white stuff yet. Eddie told him that he had some "Lumbo" but three was all that he had left out of 200. Layton said he would come up this week to get them and bring the money and Eddie told him if he, (Eddie) was not available, that Jessie (Last Name Unknown), could handle it.

The following activities were recorded on August 1, 1979, on telephone number 336-5826:

At 12:14 p.m. Kenneth Johnson placed a call to Kelly (Last Name Unknown), and advised that an unknown person would bring something by the shop for him to pick up some time in the afternoon. He said that there would be no prior notice when this individual arrived and that there would be some money for him (Kelly) at the shop about 2 p.m.

At 1:21 p.m., Kenney placed a call to Joe Armstrong at the District Attorney's Office in Norman, Oklahoma. After greetings, Armstrong said it was "warm down here" and Kenney said "it was warm up there also". Armstrong said he needed to see Kenney and also Eddie Riveira and when Kenney asked "when do you want me to come", Armstrong answered, "the sooner the better". Kenney asked him to check the registration on a license tag which Armstrong agreed to do. Also, during the conversation, Armstrong again said he particularly needed to talk to Eddie,

but would not do so on the telephone. At the conclusion of the conversation, Kenney told Armstrong that he had two tickets for the Bee Gees singing group concert for him.

At 4:08 p.m., Kenney called Armstrong again and was furnished the registration information previously requested by him. Kenney told Armstrong that Eddie would be by to see him at approximately 5 p.m. and Armstrong said he would wait at his office for Eddie to call. At the conclusion of the conversation Kenney said "I appreciate the help", and Armstrong replied, "any time, just let me know".

The following calls were recorded on telephone number 336-5604:

At 9:04 a.m. Neil (Last Name Unknown), called Eddie and said that he understood that Eddie had three left. Eddie replied yes and asked if he needed them. Neil said that he did and Eddie agreed to run them over to him later.

At 11:22 a.m., Robert called Eddie and talked about their flight to Chicago. They discussed how they were going to bring the stuff back from up there and that Eddie was bringing the money. During the conversation Eddie said he had invested some money in some green.

At 12:08 p.m., Kenney received a call from Jan Brewer. She told him that she had been interviewed in a District Attorney's Office the day beforeee from 4:30 p.m., to 6:30 p.m. She said she asked the District Attorney why her name had been mentioned along with Armstrong's name. She asked Kenney not to say anything about this, because the District Attorney said that it would get back to Armstrong. She also asked Kenney if he had anything yet and he replied "not right now". He went on to say that Tom, Kelly, and a whole bunch of other people called and they were all coming to the shop that afternoon.

At 2:24 p.m., Joe Armstrong called for Kenney and he was not there. He left a message to tell Kenney that he,

Armstrong, had the information that Kenney wanted and to call him back.

On August 1, 1979, Special Agents of the Federal Bureau of Investigation observed Eddie Riveira and Robert Lopez boarding a Braniff Airlines flight at 6 p.m. at Will Rogers World Airport, Oklahoma City, bound for Chicago, Illinois. The same individuals were observed by Special Agents of the Federal Bureau of Investigation departing that flight at O'Hare Airport in Chicago and their activities, thereafter, were also observed.

On August 2, 1979, the following call was recorded on telephone number 336-5404:

At 8:35 p.m., Joline Talley called and talked to Rhonda Vasser about the detention of Kenneth Johnson and Max Abiledinger at Will Rogers World Airport that day. Joline was highly irate because Johnson had left town without seeing her as he was supposed to do at Noon on August 2, 1979. She stated she could not understand why Johnson was arrested when he was not the main man.

At 3 p.m., on August 2, 1979, Kenneth Johnson and Max Abiledinger were detained at the Security Check Point at Will Rogers World Airport, Oklahoma City, Oklahoma. Abiledinger was in possession of approximately $50,000, $15,000 of which was confiscated by the Internal Revenue Service for his failure to pay back taxes. Also confiscated was a cocaine testing kit. These individuals had reservations to fly to Chicago under the names Kenneth and Corky or Cory Johnson.

The following activities were recorded on August 3, 1979, on telephone number 336-5404:

At 5:20 p.m., Eddie called Robert and told him that they were "okay and got it back but they were going to lose about 15." Eddie also said they had a tester on them which gave them the only hassle. Robert said he thought he would be able to get the people to bring what they have left.

At 5:24 p.m., Eddie again called Robert and was told he (an unknown person) would go to Kansas City and "take the coke". He (unknown person) told Eddie that people at the airport knew where his tickets were for and he would rather not go up there. Eddie said now more than ever that they needed the stuff and that they still have the green and would drive to Kansas City to get it.

At 5:31 p.m., Eddie called Kenney and told him he was making the arrangements. Kenney said he would still be willing to go to Kansas City but reminded Eddie not to make any arrangements over the telephone.

At 5:47 p.m., Robert called Eddie and said that he had talked to the people that, they have to stay there. Robert said that the people have only 22 left and Eddie responded that he thought it would be worth it but would have to talk with others.

On August 4, 1979, the following activities were recorded:

At 7:33 a.m., Eddie called Robert and asked if he had found out anything. Robert said they had told him to come on up and Eddie asked "for the key". Robert gave Eddie the contact's telephone number and Eddie told him that he would take care of him, Robert, on this one.

The following calls were recorded on telephone number 336-5404:

At 12:14 a.m., Jan Litton called Eddie from Montana looking for Kenney or Max. She said to tell Max she called and that she needed a pound.

At 8:44 a.m., Eddie called Robert and said that he, Eddie, was going to fly and the others would drive.

At 9:01 a.m. Eddie made reservations for two on American Airlines to Chicago in the names John Silva and wife Mary. They were to depart that evening and return Monday afternoon.

At 11 a.m., Joe Armstrong called Eddie and said that he needed to talk to Eddie badly. They agreed to meet at 2 p.m. at the Smugglers Inn Bar in Oklahoma City. During the conversation Armstrong told Eddie, "a word of advice, watch yourself, watch yourself, tell him, too."

Shortly after 2 p.m., Special Agents of the Federal Bureau of Investigation observed the meeting between Joe Armstrong and Eddie Riveira which lasted approximately one and one-half hours. Thereafter, Eddie was observed boarding an American Airlines plane bound for Chicago, Illinois. Eddie was observed arriving at O'Hare Airport alone on the same evening by Special Agents of the Federal Bureau of Investigation and his activities were, thereafter, scrutinized.

The following activities were recorded on August 5, 1979, on telephone number 336-5404:

At 3:53 a.m., Max called Rhonda Vasser and asked what name Eddie was using. She replied, John Silva.

At 7:43 a.m., Eddie called Rhonda from Chicago and asked her to go to her house so that he could give her the room number and telephone number where he was staying. She stated she did not have a car and, thereafter, he went ahead and gave her the numbers. He told her to give them to Max when he calls and that Max had the area code where he was staying.

At 10:37 a.m., Max called Rhonda and she gave him the information indicated above.

At 10:02 p.m., Robert called for Eddie and Rhonda told him that Eddie had gone to Chicago. She said she had planned to go but that Kenney and Max told her not to.

The following activities were recorded on August 6, 1979, for telephone number 336-5404:

At 7:03 p.m., Eddie placed a call to Joline Talley and told her that he needed to see her. She said that she would be over in about 30 minutes.

At 7:50 p.m., Eddie placed a call to Joe Armstrong in Norman, Oklahoma. Eddie asked him if he had found out anything about the Fiat and Armstrong replied, "yes". Eddie then asked him if they needed to talk tonight, and Armstrong also said yes to that. Armstrong did not want Eddie to come to his house, so they agreed to meet at 10 o'clock at the Roy Rogers Restaurant on Lindsey Street in Norman.

A surveillance of this restaurant was instituted by affiant at the Roy Rogers Restaurant in Norman, Oklahoma, and Armstrong was observed at that location on two separate occasions between 10 p.m., and Midnight. Eddie Riveira, in the company of Rhonda Vasser, was also seen at that location on two separate occasions. During this time Armstrong and Riveira were never seen together.

The following activities were recorded on August 7, 1979, for telephone number 336-5404:

At 4:29 p.m., Eddie called Robert, who asked, "did you do any good?" Eddie replied, "yes, excellent." Robert again asked, "were them guys satisfied?" Eddie said "yes, everybody was, but we got to watch what we say on the phones. I know my phone's tapped. I've checked on it". Eddie then said he would go to a pay telephone and call Robert collect.

On July 31, 1979, CI Number 2 met with Eddie Riveira at Perry, Oklahoma. During this meeting Riveira asked CI Number 2 to obtain a gooseneck cattle trailer and help him steal some cattle. Riveira also wants CI Number 2 to go with him to Texas and bring back a stolen four-wheeel drive pickup that he, Riveira, has in storage.

Riveira told CI Number 2 that Joe Armstrong, the Assistant District Attorney in Norman, Oklahoma, is pres-

ently keeping a low profile because he, Armstrong, feels that he is under investigation by the Oklahoma State Bureau of Investigation.

Rhonda Vasser is the receptionist at Automotive Enterprises, Perry, Oklahoma, which is owned jointly by Eddie Riveira and Robert Lopez. She is also Riveira's girlfriend and stays at his home on numerous occasions. While Riveira was in Texas in July of 1979, attempting to obtain narcotics, Rhonda Vasser covered his absence from the business with fictitious stories as to his whereabouts.

On August 10, 1979, telephone service to number 405/336-5826, Automotive Enterprises, 1517 Cedar Street, Perry, Oklahoma, was discontinued at the request of Eddie Riveira. The only telephone remaining at Automotive Enterprises is an extension of telephone number 405/336-5404.

On August 7, 1979, Gregg Brower, Special Agent, Drug Enforcement Administration (DEA), advised he had received a call from a DEA Agent in Idaho after the detention of Max Abiledinger at Will Rogers World Airport. The Agent from Idaho said that Abiledinger was thought to be one of the main suppliers of narcotics to the Montana and Idaho areas.

On August 14, 1979, at 8:48 a.m., Eddie Riveira called Robert Lopez and asked if he was still planning to come up at the end of the week. Robert indicated that he was and then they discussed what they were going to do about a Chevelle automobile in Eddie's possession. Robert said he would take it back to his place, store it for a month or two, and then take it on to the Valley to sell.

On August 15, 1979, at 6:20 p.m., Dennis Black, a Noble County Deputy Sheriff in Perry, Oklahoma, called Eddie Riveira at the shop on telephone number 336-5404 and Black said, "I haven't made a dope sale in a long time. I couldn't buy anything." Eddie told him he better get out and start selling some then. At the conclusion of the con-

versation, Eddy asked, "how much heat is on me today". Black replied, "Not any that I know of". Eddie then said "check on it and when Black asked why, Eddie said, "you said earlier they wanted to arrest him".

On August 16, 1979, at 11:56 a.m., Joe Armstrong, Assistant District Attorney, Norman, Oklahoma, called Eddie Riveira and said that he would be coming by in a couple of hours. Armstrong said he was on his way somewhere, (sounded like Ponca City), and wanted to take a shower at Eddie's house. He said that when he got to town he would give Eddie a call.

At 1:37 p.m., on the same date Armstrong called for Eddie at his shop who was not in at the time. Jessie (Last Name Unknown), answered and Armstrong said to tell Eddie that he would meet him, (Eddie) at his home and he would be there in about two minutes.

On August 16, 1979, Special Agents of the FBI attempted to surveil the meeting between Joe Armstrong and Eddie Riveira at Perry, Oklahoma. Affiant identified Armstrong in the vicinity of Riveira's residence driving a white Chevrolet Camero Z28, license number unrecorded. Due to the extreme difficulty of maintaining a surveillance in the residential neighborhood, contact with Armstrong was subsequently lost. Spot checks of the residence continued for approximately one and one-half hours and it was noted that the meeting beetween the two did not take place at Riveira's residence.

On August 16, 1979, Special Agent Ronald Hignight, DEA, Tulsa, Oklahoma, advised that he had been in contact with their DEA office in Boise, Idaho, regarding Max Eugene Abiledinger. According to their Boise office, Abiledinger is considered a Class I narcotics violator and is alleged to be dealing in approximately six pounds of cocaine a week. He is also suspected of being involved in two contract killings in the Idaho-Montana area.

On August 16, 1979, a Special Agent of the FBI of the Chicago Office, advised that their follow-up investigation regarding persons contacted by Eddie Riveira during his recent trip to Chicago indicates that at least one of the individuals contacted by him has LCN connections in that city.

7. Normal investigative procedures have been employed and have proven unsuccessful or will reasonably appear to be unlikely to succeed if tried in developing the precise nature and scope of the illegal activity and the relationship of the organization with other racketeering groups for the same reasons as set forth in Section 5(c) of Exhibit A.

MINIMIZATION

Pursuant to the provisions of Title 18, United States Code, Section 2518(5), this interception will be conducted in such a way as to minimize the interception of communications not otherwise subject to interception, and will terminate upon attainment of the authorized objectives, or in any event, at the end of 15 days. In this regard, the monitoring of intercepted wire conversations for telephone number 405/336-5404, will immediately terminate when it is determined through voice identification or otherwise that none of the conspirators are participants in the conversation or that the conversation is not criminal in nature.

(s) *Jerry L. Emmons*
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me
this *12th* day of *Sept.*, 1979.

(s) *Ralph G. Thompson*
UNITED STATES DISTRICT JUDGE

APPENDIX F

[Second Order Authorizing Interception of Wire Communications, dated Sept. 12, 1979. — Filed Nov. 19, 1979, U.S. District Court. — Caption Omitted in Printing]

ORDER AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS

Application under oath having been made before me by Charles Lee Waters, Assistant United States Attorney for the Western District of Oklahoma, and an "investigative or law enforcement officer" as defined in Section 2510 (7) of Title 18, United States Code, for an order authorizing the interception of wire and oral communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

(a) There is probable cause to believe that Eddie Riveira, Jr., hereinafter referred to as Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong; Rhonda Vasser, Dennis Black, and others as yet unknown, have committed and are committing offenses involving the sale and distribution of controlled substances in violation of Section 841 of Title 21, United States Code, and conspiracy to commit such offenses in violation of Section 846 of Title 21, United States Code, and offenses involving Interstate Travel in Aid of Racketeering (narcotics) in violation of Section 1952 of Title 18, United States Code; Interstate Transportation of Stolen Property in violation of Section 2314 of Title 18, United States Code; and Conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code; offenses involving Racketeer Influenced and Corrupt Organizations in violation of Title 18, United States Code, Section 1963, more particularly defined in Section 1962 (c) and 1962 (d), with acts of racke-

teering as defined in Section 1961 of Title 18, United States Code as follows:

The above described violations of Sections 1952 and 2314 of Title 18, United States Code and violations of Section 841 of Title 21, United States Code and violations of Oklahoma State Statutes relating to robbery (Section 798 of Title 18, Oklahoma Statutes Annotated), and the sale of drugs and narcotics, (Section 2-401 of Title 63, Oklahoma Statutes Annotated), both of which are punishable by imprisonment for more than one year.

(b) There is probable cause to believe that particular wire communications concerning these offenses will be obtained through the interception, application, for which authorization is herewith applied. In particular, these wire communications will include discussions about the dissemination of confidential information belonging to law enforcement agencies, the sale and distribution of cocaine, marijuana and other controlled substances, and Interstate Transportation in Aid of Narcotics Business, participation in a Racketeer Influenced and Corrupt Organization; the identity of the participants; the precise nature and scope of the illegal activity, and the relationships of the organization with other racketeering groups. In addition, the communications are expected to constitute admissible evidence of the commission of the offenses in violation of Section 2312 of Title 18, United States Code, (Transportation of Stolen Vehicles), Section 2316 of Title 18, United States Code, (Transportation of Cattle) and Section 2317 of Title 18, United States Code (Sale or Receipt of Cattle).

(c) Normal investigative procedures either have been tried without success and reasonably appear unlikely to succeed if continued or reasonably appear unlikely to succeed if tried.

(d) There is probable cause to believe that the premises at 1317 North Ninth Street, Apartment 10, Perry, Oklahoma, carrying telephone number 405/336-5404, which is

subscribed to by Eddie Riveira, also known as Eddie Rivera, the premises located at Automotive Enterprises, 517 Cedar Street, Perry, Oklahoma, carrying telephone numbers 405/336-5404, mentioned above, are being used by Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong; Rhonda Vasser, Dennis Black, and others as yet unknown, in connection with the commission of the above-stated offenses.

WHEREFORE, it is hereby ordered that Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized, pursuant to application authorized by the Assistant Attorney General lof the Criminal Division, The Honorable Phillip B. Heymann, who has been specifically designated by the Attorney General of the United States, to exercise the power conferred on him by Section 2516 of Title 18, United States Code, to intercept wire communications of Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong; Rhonda Vasser, Dennis Black, and others as yet unknown, concerning the above-described offenses to and from telephone number 405/336-5404, appearing in two locations, 1317 North Ninth Street, Apartment 10, Perry, Oklahoma, and Automotive Enterprises, 517 Cedar Street, Perry, Oklahoma, and subscribed to in the name of Eddie Riveira.

Such interception shall not automatically terminate when the type of communication described above in paragraph (b) has first been obtained, but shall continue until communications are intercepted which reveal the manner in which Eddie Riveira, also known as Eddie Rivera; Robert Lopez; Kenneth Johnson; Max Abiledinger; P. Joseph Armstrong, also known as Joe Armstrong; Rhonda Vasser, Dennis Black, and others as yet unknown participate in offenses involving the sale and distribution of controlled substances in violation of Section 841 of Title 21, United States Code, and conspiracy to commit such offenses in

violation of Section 846 of Title 21, United States Code, and offenses involving Interstate Travel in Aid of Racketeering, (narcotics) in violation of Section 1952 of Title 18, United States Code; Interstate Transportation of Stolen Property in violation of Section 2314 of Title 18, United States Code; and Conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code; offenses involving Racketeer Influenced and Corrupt Organizations in violation of Title 18, United States Code, Section 1963, more particularly defined in Section 1962 (c) and 1962 (d), with acts of racketeering as defined in Section 1961 of Title 18, United States Code as follows:

The above-described violations of Section 1952 and 2314 of Title 18, United States Code and violations of Section 841 of Title 21, United States Code and violations of Oklahoma State Statutes relating to robbery (Section 798 of Title 18, Oklahoma Statutes Annotated), and the sale of drugs and narcotics (Section 2-401 of Title 63, Oklahoma Statutes Annotated), both of which are punishable by imprisonment for more than one year, which reveal the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of fifteen (15) days.

It is further ordered, upon request of applicant, that the Southwestern Bell Telephone Company, a communication common carrier as defined in Section 2510 (10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the Southwestern Bell Telephone Company to be compensated for by the applicant at the prevailing rates.

PROVIDING THAT, this authorization to intercept wire communications shall be executed as soon as practicable after signing of this order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objectives or, in any event, at the end of the fifteen (15) day period granted herein.

PROVIDING ALSO, that the United States Attorney, or an Assistant United States Attorney, shall provide the Court with a report on or about the fifth day and every fifth day thereafter until termination, following the date of this order showing what progress has been made toward achievement of the authorized objectives and the need for continued interception.

Dated this *12th* day of *Sept.*, 1979.

(initials RGT)
USDJ

APPENDIX G

[Excerpts from District Court Opinion (Daugherty, J.) Overruling Motion to Suppress Fruits of Electronic Interception of Wire Communications Because of Violation of 18 U.S.C. 2518(1)(c), Filed December 17, 1979.]

Defendants Abiledinger and Johnson seek suppression of all evidence obtained by electronic surveillance under the two Orders authorizing the wire intercepts involved herein. These Orders, the first dated July 19, 1979, and the second dated September 12, 1979, were entered by Judge Ralph G. Thompson of this Court. Defendants contend that suppression is required due to various deficiencies in said Orders and the applications therefor and supporting affidavits and the manner in which the authorized surveillance was conducted.

18 U.S.C. §2518(1) sets out the requirements for each application for an order authorizing or approving interceptions of wire or oral communications. One of these requirements is that the application contain "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. 18 U.S.C. §2518(1)(c). Defendants maintain that this requirement was not met in this case.

Examination of the applications for both of the intercept Orders involved herein reveals that said applications were made upon the required oath by Charles Lee Waters, an Assistant United States Attorney for this judicial district. Numerical paragraph 4(c) of both applications states that "[t]he attached affidavit contains a full and complete statement explaining why normal investigative procedures either have been tried and have failed or reasonably appear unlikely to succeed if tried." The "attached affidavit" referred to is the affidavit of Jerry Emmons, the Special Agent of the Federal Bureau of Investigation who co-

ordinated the investigation in the instant case, which was submitted in support of the applications. Numerical paragraph 5(c) of Agent Emmons' affidavit submitted in connection with the application for the July 19th Order is a detailed recitation of the normal investigative procedures that had been employed in this case and why the same had been unsuccessful or appeared unlikely to succeed. A copy of this affidavit was attached to another affidavit of Agent Emmons that was submitted in support of the application for the September 12th Order. Numerical paragraph 7 of the latter affidavit incorporated paragraph 5(c) of the former affidavit by reference.

In view of the foregoing, it appears that the application and supporting affidavits under consideration satisfy the requirements of §25518(1)(c). Moreover, Agent Emmons' testimony at the evidentiary hearing held in connection with the instant Motions clearly established that investigative procedures other than electronic surveillance had in fact been tried and failed or were unlikely to succeed. Therefore, after thoroughly examining the applications and supporting affidavits herein, the Court finds and concludes that the instant applications contain all of the information required by 18 U.S.C. §2518(1).